Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JONATHAN LOPEZ,

Petitioner,

v.

KELLY G. CANDAELE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Los Angeles Community College District prohibits students from engaging in speech deemed "offensive," "harassing," "degrading," and "sexist" as subjectively defined by listeners and administrators. The District further instructs students to self-censor their speech if they think it may "offend" a listener. The District threatens students with discipline for violating these prohibitions.

A clear circuit split exists regarding the following questions:

1. Whether an objectively reasonable chilling effect on student speech, caused by a speech code and related policies that apply to every human interaction on campus, suffices under Article III to give students standing to challenge the policies on their face.

2. Whether, in the alternative, a student so affected by the policies merits standing under the overbreadth doctrine to assert the rights of others not before the Court.

PARTIES TO THE PROCEEDING

Petitioner is Jonathan Lopez, a student at Los Angeles City College.

Respondents are current or former Los Angeles Community College District Board of Trustees members Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock (former member), Miguel Santiago, and Sylvia Scott-Hayes, in their individual and official capacities; Gene Little, in his individual and official capacities as Director of the Los Angeles Community College District Office of Diversity Programs; Jamillah Moore, in her individual and official capacities as President of Los Angeles City College; Allison Jones, in her individual and official capacities as Dean of Academic Affairs at Los Angeles City College; Christy Passman, in her individual and official capacities as Compliance Officer at Los Angeles City College.

Respondent, and Defaulting Defendant in the Court of Appeals, is John Matteson, in his individual and official capacities as Professor of Speech at Los Angeles City College.

CORPORATE DISCLOSURE STATEMENT

Petitioner Jonathan Lopez is an individual person.

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DECISIONS BELOW

The Ninth Circuit's Amended Opinion denying rehearing and rehearing en banc, and withdrawing and superseding the original Opinion, is reported at 630 F.3d 775 (9th Cir. 2010). Appendix ("App.") 1-36a. The Ninth Circuit's original opinion is reported at 622 F.3d 1112 (9th Cir. 2010). The order of the District Court granting Petitioner's motion for preliminary injunction is unreported. App. 69-89a. The order of the District Court denying Respondents' motion for reconsideration of the preliminary injunction is unreported. App. 55-68a. The order of the District Court granting in part and denying in part Respondents' motion to dismiss is unreported. App. 37-54a.

STATEMENT OF JURISDICTION

The Court of Appeals issued its original opinion on September 17, 2010, and denied a timely petition for rehearing and rehearing en banc on December 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Article III, Section 2 of the United States Constitution provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, ...

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The District and LACC policies governing sexual harassment are set forth at App. 116-26a.

STATEMENT OF THE CASE

A. Factual Background

This petition is one of two concurrently-filed petitions requesting that this Court resolve a stark circuit split regarding the Article III standing of students to mount facial challenges to university "speech codes." Students attending universities in states under the jurisdiction of the Third and Sixth Circuit Courts of Appeals unquestionably have Article III standing to challenge the speech code of the university they attend so long as they provide evidence that their speech is "chilled." By contrast, despite well-established principles from this Court's decisions favoring First Amendment challenges, students in the Fourth and Ninth Circuits who labor under a speech code may not challenge it until it has been formally enforced against them. Uncontradicted evidence of a chilling effect does not confer Article III standing, nor do explicit threats of enforcement. That mistaken doctrine blurs the line between facial and as-applied challenges, ignores precedents from this Court, and radically undervalues core protected speech.

In a campus environment rife with speech-restrictive policies, this split threatens to (further) stifle the marketplace of ideas on campus and cause college students to self-censor rather than risk punishment under various—and manifestly unconstitutional—speech policies. This Court should intervene to clear up the confusion and confirm a simple proposition: a student whose speech is chilled by the speech code of the university

he or she attends has standing to challenge it to vindicate the First Amendment.

1. The Los Angeles Community College District's Speech Code

Petitioner Jonathan Lopez is a student at Los Angeles City College ("LACC"), an institution of higher education in the Los Angeles Community College District ("District"). App. 6a. Respondents are District and LACC administrators and one LACC professor. App. 104-09a. The District maintains a speech code that requires students to comply with its terms at all times on campus. App. 6-9a, 119a ¶72. The speech code instructs students to self-censor their speech if they think it might "offend" someone, App. 121-22a ¶79, 123-24a ¶85, 126a ¶90, and allows administrators to punish speech based on the perceived motives of the speaker or the subjective reaction of listeners without any regard to the severity or pervasiveness of the allegedly offending speech, App. 118a ¶66. LACC personnel and students used the speech code to censor and inflict negative repercussions on Lopez for "offending" them by expressing religious viewpoints.

The District published its speech code in a series of "sexual harassment" policies contained in two Board Rules, the LACC Student Handbook, and four webpages. App. 6-9a, 117-18a ¶¶64-66, 119-26a ¶¶72-91. Although labeled as "sexual harassment" policies, the speech code prohibits much more than unlawful sexual harassment.

The speech code forbids "sexual harassment," which the District broadly defines as

> verbal, visual or physical conduct of a sexual nature, made by someone from or in . . . the educational setting, under any of the following conditions:
>
> . . .
>
> 3. The conduct has the *purpose or effect* of having a *negative impact* upon the individual's work or academic performance, or of *creating an intimidating, hostile or offensive work or educational environment.*

App. 7a, 118a ¶66 (emphasis added). The operative terms are undefined. App. 118a ¶67.

District and LACC websites further define "sexual harassment."[1] The District's website defines harassment as "verbal harassment," "disparaging sexual remarks about your gender," and "[m]aking unwelcome, unsolicited contact with sexual overtones (written, verbal, physical and/or visual contact)." App. 8a, 120-21a ¶78. LACC's website lists "common" types of sexual harassment as "generalized sexist statements," and "insulting, intrusive or degrading attitudes/comments about

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[1] The District's Office of Diversity Programs and LACC's Compliance Office each publish "Sexual Harassment" and "Overview" websites that define "sexual harassment." App. 8-9a, 120-26a ¶¶76-91.

women or men." App. 9a, 123a ¶84. At LACC "[h]ostile environment harassment" occurs "when an individual or group's conduct has a negative impact on you, thus creating a hostile or intimidating work and/or academic environment." App. 125a ¶89. These forms of "harassment" "can be intentional or unintentional." App. 120a ¶77, 122-23a ¶83.

The websites instruct students to self-censor their speech if they believe it may "offend" someone: "If unsure if certain comments or behavior are offensive do not do it, do not say it. . . . Ask if something you do or say is being perceived as offensive or unwelcome. If the answer is yes, stop the behavior."[2] App. 122-23a ¶79; *see* App. 8-9a. In fact, a "victim does not have to be the person directly harassed but could be anyone affected by the offensive conduct." App. 122a ¶80. Anyone who "believes, perceives or actually experienced conduct" that may violate the speech code may file a complaint. Ct. of Appeals Excerpts of Record ("ER") p. 396, 402. Failure to comply with the speech code can result in punishment up to and including expulsion.[3]

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[2] The District's Sexual Harassment webpage, as well as LACC's Sexual Harassment and Overview webpages each contain a version of this policy. App. 122-23a ¶79, 123-24a ¶85, 126a ¶90

[3] Board Rule 9803 and the Rules for Student Conduct require students to conform their conduct and speech to District and LACC rules and regulations. App. 116-17a ¶63, 119a ¶72.

2. Actual and Threatened Enforcement of the Speech Code to Silence Lopez

In the fall of 2008, Lopez was a student in Speech 101: Introduction to Public Speaking. App. 9a. Respondent and Defaulting Defendant Matteson taught the class. App. 9a, 13a n.4. During this same period, voters in California considered and voted in favor of Proposition 8, a ballot initiative to amend the California Constitution to define marriage as the union of one man and one woman. App. 112a ¶43. The social and political debate over Proposition 8 elicited strong feelings on both sides. Indeed, during the first class after the November 2008 election, Matteson told the class that Californians who voted in favor of Proposition 8 were "fascist bastards." App. 112a ¶42.

Following the November elections Matteson asked the students to present an informative speech on any topic. App. 9a. Lopez is a Christian who holds sincerely-held religious beliefs and opinions about social, moral, religious, and political issues, like the definition of marriage. App. 9a, 109-10a-¶¶25-26. Lopez decided to discuss the tenets of Christianity and miracles he had seen in his life because of his faith. App. 9a; 111a ¶33.

On November 24, 2008, Lopez presented his speech. App. 110a ¶32. During a broad presentation of various Christian beliefs, he addressed marriage by reading the dictionary's definition of marriage as the union of a man and woman. App. 9-10a. When Lopez spoke these words, Matteson interrupted him and called him a "fascist bastard." *Id.* Invoking the

terms of the speech code, Matteson then turned to the other students in the class and said they could leave the class if they were "offended" by what Lopez said. App. 10a. None of the students left, so Matteson dismissed the class and refused to allow Lopez to finish his speech. *Id.*

When Lopez returned to his seat to collect his belongings, he found Matteson's evaluation of his speech lying on his backpack. App. 10a, 111-12a ¶39. The evaluation contained no grade. Instead, Matteson wrote, "Ask God what your grade is," and "[p]ros[elytizing] is not allowed in public schools." App. 10a. Lopez never received a grade for the assignment, which constituted twenty percent of his final grade in the class. App. 12a; ER 314.

Alarmed by his treatment, Lopez met the next day with the Dean of Academic Affairs, Respondent Allison Jones. App. 10a. Jones requested, and Lopez soon provided, a written description of Matteson's actions. App. 10a, 113-14a ¶49. But Matteson happened to see Lopez give Jones the description, and shortly thereafter confronted Lopez, saying that he was going to get Lopez "expelled from school." App. 10a. Expulsion is one possible punishment for violating the speech code. App. 8a.

Matteson's threats continued on December 2, 2008, when Lopez turned in an assignment outlining several proposed speech topics for his upcoming persuasive speech in Speech 101: global warming, protected sex, exercising your free speech, driving safely, and staying physically fit. App. 10a, 126-27a

¶93. Lopez's "free speech" topic proposed that "everyone has the right to their own opinion, beliefs and to be who they are to satisfy themselves, and not others." ER 454. On the graded assignment, directly under this statement, Matteson wrote: "Remember – you agree to student code of conduct at LACC." App. 10-11a. The LACC Rules for Student Conduct, to which Matteson referred, require students to comply with the "sexual harassment" policies at all times on campus. App. 8a.

The same day, Lopez sent a letter to Jones, through counsel, expressing his concerns about Matteson's behavior and his refusal to grade Lopez's speech. App. 11a.

Jones responded to Lopez's letter on December 4, 2008, warning Lopez that his speech offended his peers and that several filed complaints asking for his punishment. App. 11-12a. Jones wrote that she took the matter seriously and that Lopez would receive a fair grade in Speech 101. App. 12a. But Jones also wrote that several students in Speech 101 found Lopez's speech "deeply offensive," labeled it "hateful propaganda," and asked Jones to make Lopez "pay some price for preaching hate in the classroom." App. 11-12a. Lopez eventually received an "A" in Speech 101, but he never received a grade for his informative speech nor was he allowed to finish presenting it. App. 12a.

As a Christian who desires to share his beliefs and contribute to the marketplace of ideas on campus, Lopez used to discuss his beliefs on social,

cultural, and political issues, like the definition of marriage in California. App. 9a, 109-10a ¶¶25-26, 126a ¶92. Especially in the wake of his experience in Matteson's classroom, Lopez's speech on issues of marriage, gender, and sex has been "chilled" by the speech code. App. 113a ¶¶44-45, 116a ¶58, 127-28a ¶¶94-97. Lopez wishes to discuss these topics as he used to, but has refrained from doing so because of the speech code and Respondents' actions. App. 127-28a ¶94-97.

B. Procedural Background

1. The District Court's Decisions

Lopez filed a verified complaint in the District Court, bringing both as-applied and facial challenges to the speech code, and moved for a preliminary injunction against the speech code. App. 13-14a, 99-151a. Respondents, except Matteson, moved to dismiss. App. 14a, 37a. Respondent Matteson failed to answer or otherwise plead, so the District Court defaulted him.[4] App. 13a n.4; ER 465, ECF No. 10.

The District Court granted Lopez's motion for preliminary injunction. App. 89a. The District Court held Lopez demonstrated Article III standing to challenge the speech code on its face because the District's speech code, and Lopez's experience in Speech 101, had led Lopez to self-censor his speech for fear of punishment, thereby chilling speech

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[4] The District Court reserved entry of a default judgment against Matteson until Lopez's claims against the other Respondents are resolved.

protected by the First Amendment. App 71-72a. The District Court found that Lopez's intended speech on issues of "religion, homosexual relations and marriage, sexual morality and freedom, polygamy, or even gender politics and policies" was "arguably reach[ed]" by the speech code. App. 80a. The court also determined Lopez's claims were ripe and not moot. App. 72-74a.

On the merits, the District Court held the speech code unconstitutionally overbroad on its face. App. 78-81a. Relying upon reams of precedent striking down similar speech codes, the court found the District's code prohibits a substantial amount of protected speech. App. 78-79a. The court found that the code's application to speech that has the "purpose or effect" of creating an "offensive" environment impermissibly depended on the speaker's motives. *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216-17 (3d Cir. 2001) (Alito, J.)).

Referencing this Court's ruling in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999), the District Court also found the speech code's terms subjective, broad, and lacking any objective component to their enforcement. App. 80a. Because the District's code defined sexual harassment as "sexist statements . . . or degrading attitudes/comments about women or men," the court found that this could prohibit student views on the "proper role of the genders." App. 80a. The

District's prohibition on speaking "offensive" words also restricted the ability of students to discuss issues of "religion, homosexual relations and marriage, sexual morality and freedom, polygamy, or even gender politics and policies."[5] App. 80a.

The District Court denied Respondents' motion to reconsider the injunction, App. 57-67a, and Respondents appealed,[6] ER 475, ECF No. 67.

2. The Ninth Circuit's Decisions

The Ninth Circuit reversed and vacated the preliminary injunction based on its conclusion that Lopez lacked standing to challenge the speech code. The Ninth Circuit issued its original opinion on September 17, 2010. Lopez timely petitioned for panel rehearing and rehearing en banc, based, in part, on the conflict the panel's opinion created with the Third and Sixth Circuits. The Ninth Circuit denied the petition, filed an Amended Opinion, and withdrew the original opinion. App. 3-5a, 90-92a.

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[5] After the preliminary injunction hearing, Respondents moved to supplement the evidence by arguing that the speech code had changed. The District Court found Respondents were still enforcing the code against students, denied their motion, and excluded the evidence. App. 95-97a.

[6] While the appeal was pending, the District Court granted in part and denied in part Respondents' motion to dismiss. It dismissed some of Lopez's claims and awarded Respondents qualified immunity from Lopez's damages claims. App. 37-54a. However, it did not dismiss Lopez's facial or as-applied claims against the speech code.

The Amended Opinion held that Lopez lacked Article III standing to challenge the speech code on its face because he did not show the requisite injury-in-fact. App. 31-32a. The Ninth Circuit determined that Lopez did not show a credible threat of enforcement by Respondents and that his allegations that the speech code chilled his speech were insufficient. *Id.*

The Ninth Circuit concluded that Lopez did not show a credible threat of enforcement by Respondents. Despite Matteson censoring Lopez's informative speech and refusing to grade his assignment pursuant to the exact terms of the speech code ("offensive"), the panel found that this was neither actual enforcement nor a credible threat of enforcement. App. 24a. Nor did the panel find that Matteson's threat concerning compliance with the LACC student code of conduct sufficed as an injury. App. 24-25a. The panel also found that Jones' letter reciting the actual complaints by Lopez's peers was not a credible threat under the speech code—even though the students and Jones used the operative words of the code to register their complaints. App. 25-26a. In so concluding, the court determined that it was unlikely the District or LACC would enforce the speech code against Lopez. App. 30-31a.

Ultimately, the Ninth Circuit concluded that Lopez's allegations that the speech code chilled his speech were insufficient to merit standing to challenge the policy on its face. App. 31-32a. The court found Lopez did not adequately prove his

intent to violate the speech code because he did not show that the code arguably applies to his past or future speech. App. 26-29a. The District Court accepted that Lopez's intent to discuss his Christian views on politics, morality, social issues, religion, and other topics may constitute "verbal . . . conduct of a sexual nature" under the speech code, but the Ninth Circuit failed to accept this factual finding. App. 27a. The panel even mistakenly concluded that Lopez did not explain how his speech violates the District's official interpretations of the speech code. App. 27-28a. It also faulted Lopez for failing to point out anyone who believed the speech code could restrict Lopez's viewpoints on "homosexuality or gay marriage"—in spite of the uncontradicted evidence that Matteson censored his speech and fellow students made complaints using language from the speech code. App. 28a.

The court noted the conflicting decision of the Third Circuit in *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 238-39 (3d Cir. 2010), which held that a student had standing to facially challenge a policy that chilled his speech, and declined to follow it. App. 32-34a.

REASONS FOR GRANTING THE WRIT

At present, college students live under two—and possibly three—distinctly different standing regimes. Students in the Third and Sixth Circuits enjoy the normal First Amendment rule that an objectively reasonable allegation of a chill is sufficient to allow a student to challenge his or her university's speech code.

In the Fourth and Ninth Circuits, however, students can provide uncontradicted evidence of chill and even evidence of threatened and actual enforcement and *still* not have Article III standing to challenge manifestly unconstitutional policies. Indeed, a credible as-applied case based on the invocation, but not ultimate enforcement, of the policy in response to particular speech seems to count against standing in those Circuits, rather than confirming the seriousness of the chill.

Further, other Circuits have differing approaches that only add to the confusion. The divergence in the opinions creates conflicting student rights, undermines student free speech, and casts doubt on long-held Article III standing rules applicable to facial challenges.

This case is of exceptional constitutional importance. College students depend on free and open inquiry to fully enjoy the "marketplace of ideas" on campus. The widespread adoption of speech codes—enacted as overbroad anti-harassment, nondiscrimination, or even civility policies—threaten to skew that marketplace. These codes are unquestionably unconstitutional (indeed, they have *never* survived federal court review on the merits), but overly-restrictive Article III standing rules leave students with a terrible choice: comply and consent to censorship or defy and risk their academic careers. The Court's intervention is urgently needed to resolve the Circuit split and to reaffirm a simple and straightforward rule: a student whose speech is objectively chilled by the speech code of the

university he or she attends has standing to challenge it to vindicate the First Amendment.

I. This Court's Review Is Necessary to Resolve a Circuit Split of Exceptional National Importance.

To invoke the jurisdiction of the federal courts, a plaintiff must establish Article III standing to sue, which consists of an injury-in-fact, causation, and the likelihood that a decision will redress his injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). While in some contexts there are additional prudential obstacles to standing, in the First Amendment context, prudential principles and the values underlying the First Amendment itself all favor finding standing for someone whose speech is objectively chilled. Thus, the general standing principle in the First Amendment context is clear: When a law is aimed at restricting the speech of the plaintiff and he suffers a chill as a result, he has suffered an injury sufficient to merit standing. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *see id.* at 393 ("the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). Thus, for Article III standing purposes, an injury can be established by the desire to speak and the potential for punishment. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299-301 (1979). While "subjective 'chill'" alone does not suffice to confer standing to bring a facial challenge against policies that burden expressive freedoms, an objectively reasonable chill – viz, a credible statement by the plaintiff of the intent to

commit a prohibited act and the "conventional background expectation" that the government will enforce the law—does suffice. *See Act Now to Stop War & End Racism Coal. v. District of Columbia*, 589 F.3d 433, 435-36 (D.C. Cir. 2009).

Moreover, in the context of speech codes, the identity of the proper plaintiff is obvious—a student whose speech is chilled by the code. In that context, it is particularly reasonable for students to rely on the conventional background expectation that a university takes it speech code seriously and intends to enforce it. Despite the clear answer provided by this Court's precedents a circuit split has developed, in which some courts, exemplified by the decision below, have erected artificial barriers to standing that preclude a student chilled by his own school's speech code from raising a challenge.

A. The Ninth Circuit's Decision Squarely Conflicts with the Third Circuit's Decision in *McCauley v. University of Virgin Islands*, 618 F.3d 232 (3d Cir. 2010).

The Third Circuit applies the straightforward rule suggested by this Court's cases: a student subject to a college policy that restricts his speech on campus has Article III standing to challenge that policy on its face. Three decisions of the Third Circuit have reached this conclusion, including one written by then-Judge Alito.

Most recently, in *McCauley*, 618 F.3d at 238-39, the Third Circuit held that a student had standing to

facially challenge certain provisions of the university's speech code because those provisions had "the potential to chill protected speech." Importantly, McCauley testified that he had never suffered a deprivation based on those provisions of the policy, had never been charged with their violation, but that the policies "chilled" his speech.

After receiving notice that the University of the Virgin Islands was charging him with violating Paragraph E of the Student Code of Conduct, which prohibited causing "physical or mental harm" to another person, McCauley filed a lawsuit against the university, challenging not only Paragraph E of the Code, but also Paragraphs B, H, and R, which prohibited, respectively, "lewd or indecent conduct"; conduct that caused "emotional distress"; and the "display of unauthorized or offensive signs" at sports events, concerts, and social-cultural events. *Id.*

The Third Circuit held McCauley had Article III standing to challenge Paragraphs B, H, and R on their face, despite McCauley's concessions that he suffered no deprivations from these policies and despite the fact that he had not been charged with their violation. *Id.* "Paragraphs B, H, and R," the Third Circuit held, "all have the potential to chill protected speech." *Id.* "As such, under the 'relaxed' rules of standing for First Amendment overbreadth claims, McCauley has standing to assert facial challenges to those paragraphs." *Id.* (citation omitted).

In reaching its conclusion, the Third Circuit found that standing was conferred by the "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression," *id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)), and recognized the "critical importance" of free speech in public universities, *id.* at 242 (citing *Healy v. James*, 408 U.S. 169, 180 (1972); *DeJohn*, 537 F.3d at 314); *see also id.* at 247 (University students often "remain subject to university rules at almost all hours of the day"). Thus, even though McCauley was never threatened with punishment under the policies, never specifically articulated how they chilled his speech, and even testified that he had not self-censored, the Third Circuit still found he had standing to challenge the policies on their face. *Id.* at 239.

By contrast, Lopez not only presented evidence that the very existence of the speech code chilled his speech, he also repeatedly experienced actual and threatened censorship by LACC officials. When Lopez gave his informative speech about Christianity and marriage, reading the definition of marriage as the union of one man and one woman, he had a legitimate fear that some people would consider this a "sexist statement" prohibited by the vague terms of the District's speech code. App. 123a ¶84. The meaning of marriage and traditional gender roles in California (and elsewhere) were and still are subjects of contentious debates, eliciting strong feelings on either side. Matteson certainly seemed to believe that Lopez's speech created an

"offensive environment" under the speech code, and indeed that anyone who espoused Lopez's views was a "fascist bastard." App. 110-13a ¶¶32-45; 118a ¶66; 127a ¶¶94-96.

Matteson punished Lopez by refusing to allow him to speak and refusing to grade his assignment because his speech was "offensive"—the policy language of the speech code challenged by Lopez. App. 111a ¶¶35-36; 118a ¶66. Matteson also threatened Lopez with expulsion if he complained further of his discriminatory actions, and explicitly admonished Lopez to speak in compliance with LACC's student code of conduct—which includes the speech code—when presenting his persuasive speech. App. 113-14a ¶49; 119a ¶72; 126-27a ¶93; ER 411, 424, 454.

Unlike *McCauley*, where the plaintiff alleged no specific injury from Paragraphs B, H. and R, Lopez's Verified Complaint states that Matteson undertook his actions pursuant to the speech code, which caused Lopez to refrain from discussing similar topics in the future for fear of punishment. App. 127a ¶¶94-96; 129a ¶104. Lopez also refrained from speaking due to the complaints filed by his peers, who also used the exact language of the speech code—"offensive"—to complain about Lopez's speech. App. 11-12a, 114-15a ¶52.

Rather than view this incident as powerful confirmation that his professed chill was real, the Ninth Circuit concluded that these accumulated actions did not amount to credible threats of

enforcement, despite the fact that each reference to Lopez's speech on Christianity and marriage labeled his speech as "offensive." App. 111a ¶36; 114-15a ¶¶52, 127a. But that conflates as-applied and facial challenges. Indeed, it is as if the Ninth Circuit viewed the fact that Lopez was threatened with application of the speech code as a reason to deny him an ability to mount a facial attack. That approach completely undermines the more permissive First Amendment rules for facial challenges. It is also wholly irreconcilable with *McCauley*.

In *McCauley*, the student was not threatened with enforcement of the challenged policies, nor did he express what he wanted to say that would violate the policies. Instead, he admitted he suffered no specific deprivation. Nevertheless, the university required him to comply with the policies at all times on campus. The "chill" was an objective reality not a subjective experience. But here, the Ninth Circuit did not grant Lopez similar standing, even though LACC officials and his peers actually enforced and threatened enforcement of the speech code. In doing so the lower court misapplied the doctrine of facial overbreadth standing and created a circuit split with *McCauley*.

Moreover, *McCauley* is not an outlier in the Third Circuit. On at least two previous occasions the Third Circuit granted students Article III standing to facially challenge college and secondary school harassment policies that chilled their speech. In *DeJohn v. Temple University*, the Third Circuit held

a student had standing to facially challenge the overbreadth of a sexual harassment policy, nearly identical to the one in this case, by pleading that "he felt inhibited in expressing his opinions in class concerning women in combat and women in the military," which he "believed were implicated by the policy," and "might be sanctionable by the University." 537 F.3d at 305. The Third Circuit concluded that the student had standing because the "policy had a chilling effect on his ability to exercise his constitutionally protected rights." *Id.* at 305, 313-14.

Further, in *Saxe v. State College Area School District*, the Third Circuit, in an opinion written by then-Judge Alito, held that two high school students had Article III standing to facially challenge a sexual harassment policy—nearly identical to the one here—merely by showing it chilled their speech. 240 F.3d at 203. The students had standing simply because they "identif[ied] themselves as Christians," believed "they ha[d] a right to speak out about the sinful nature and harmful effects of homosexuality," and "feared that they were likely to be punished under the Policy for speaking out about their religious beliefs." *Id.* *See also Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621, 625 (M.D. Pa. 1999) (conferring standing); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 251 (3d Cir. 2002) (finding Article III standing to challenge harassment policy as overbroad even though student was threatened with enforcement under a different policy); *Trotman v. Bd. of Trustees of Lincoln Univ.*, 635 F.2d 216, 228-29 (3d Cir. 1980) (finding

professors who received letters implicitly, but not overtly, threatening discipline had Article III standing to sue university for chilling speech).

Lopez pleaded uncontroverted facts similar to those in *DeJohn* and *Saxe*. Lopez "shares his beliefs about Christianity with others, particularly, his fellow students." App. 109a ¶25. He "often discusses his faith and how it applies to guide his views on political, social, and cultural issues and events." *Id.* He "looks for opportunities" to do this "between classes among friends and fellow students, and sometimes during appropriate class opportunities." App. 109-10a ¶26. Lopez "finds himself consistently engaged in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101." App. 126a ¶92. But Lopez "fears that the discussion of his religious, political, social and/or cultural views regarding these issues may be sanctionable under the speech code." *Id.* Indeed, Lopez states that Matteson's actions and the speech code chilled his expression, App. 127a ¶94, which "caused him to refrain from discussing his beliefs with respect to political, social, and cultural issues and events," App. 127a ¶95.

Lopez would have Article III standing in the Third Circuit. In the Ninth Circuit, he does not.

B. The Ninth Circuit's Decision Conflicts with the Sixth Circuit's Decision in *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995).

In *Dambrot v. Central Michigan University*, student members of the basketball team challenged the facial overbreadth of the university's policy on racial and ethnic harassment after the university fired their coach for using a racial slur in the locker room. 55 F.3d at 1182. The policy contained language similar to the speech code in this case. *See id.* (defining harassment as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment"). The university never threatened enforcement of the policy against the students, nor did the students plead that they intended to violate the policy. *Id.* at 1182-83. They only pleaded that they occasionally used the same word that resulted in the coach's dismissal and feared similar punishment. *Id.* at 1180.

The Sixth Circuit affirmed the district court's finding that the students had Article III standing facially to challenge the harassment policy because the "overbreadth doctrine . . . allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to 'chill' the exercise of free speech and expression." *Id.* at 1182; *see Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 480 (E.D. Mich. 1993) (finding students have standing to challenge policy because they "might be subjected to it"); *see also G &*

V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1076 (6th Cir. 1994) ("It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact.").

In *Dambrot*, the students speech was chilled because a *non-student* (who, as a university employee, enjoyed *fewer* free speech protections) was punished under the university policy. In this case, Lopez's speech was not only chilled by the policy, but he also *personally* suffered actual censorship and threatened enforcement of the speech code.

In *Dambrot*, the Sixth Circuit found the lack of actual enforcement against the plaintiff students to be irrelevant. The students had Article III standing because the "text of the policy" stated that "language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." 55 F.3d at 1183. The mere existence of such language presented a "realistic danger" of enforcement. *Id.*; *see Act Now to Stop War & End Racism Coal.*, 589 F.3d at 435-36 (objective chill evidenced by the "conventional background expectation that the government will enforce the law").

In square conflict with *Dambrot*, the Ninth Circuit concluded that Jones (the Dean of Academic Affairs) dispelled the speech code's threat of punishment by opining that "First Amendment rights will not be violated." App. 25a. The *Dambrot* court, in contrast, held that a college's professed intent not to enforce a harassment policy is

insufficient to cure an injury, where the plain language of the policy shows that the college can enforce it at any time. *See* 55 F.3d at 1183 (refusing to deny Article III standing because the policy promised to respect First Amendment rights); *see also United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Lopez would have Article III standing in the Sixth Circuit. In the Ninth Circuit, he does not.

C. The Ninth Circuit's Decision Conflicts with the Seventh Circuit's Decision in *Zamecnik v. Indian Prairie School District #204*, — F.3d —, 2011 WL 692059 (7th Cir. Mar. 1, 2011)

Just days ago, the Seventh Circuit issued a decision that also conflicts with the Ninth Circuit's decision below. Like the Third and Sixth Circuits, the Seventh Circuit recognizes that students—even in high school—have standing to facially challenge applicable school policies that objectively chill their speech.

In *Zamecnik v. Indian Prairie Sch. Dist. #204*, --- F.3d ---, 2011 WL 692059 (7th Cir. Mar. 1, 2011) (Posner, J.), the Seventh Circuit held Andrew Nuxoll had Article III standing to challenge his high school's speech code—even though it had never been enforced against him. A different student, Heidi

Zamecnik, wore a T-shirt to the school in 2006 that said, "Be Happy, Not Gay." School officials inked out "not gay" because it violated the school's policy prohibiting "derogatory comments" that refer to, *inter alia*, "sexual orientation." *Id.* at *1; *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 670 (7th Cir. 2008). Nuxoll testified that, despite his desire to wear a similar T-shirt during the 2007 school year, he never "wore a shirt that contained the phrase, or otherwise tried to counter the [a gay rights event], for fear of being disciplined." *Nuxoll*, 523 F.3d at 670.

Despite the fact that school officials never sought to enforce the "derogatory comments" policy against Nuxoll or even threatened to do so, *Zamecnik*, 2011 WL 692059, *1–4; *Nuxoll*, 523 F.3d at 669–70, the Seventh Circuit not only entertained Nuxoll's facial challenge, *Nuxoll*, 523 F.3d at 670, but granted him a preliminary injunction,[7] *id.* at 675, and upheld a permanent injunction and damages award, *Zamecnik*, 2011 WL 692059, *4, 8. And what was the injury that merited not just standing, but extraordinary judicial relief on the merits? "Nuxoll's desire to wear the T-shirt on multiple occasions in 2007 was thwarted by fear of punishment." *Id.* at *8; *see also Majors v. Abell*, 317 F.3d 719, 721 (7th

[7] Like the Third Circuit, the Seventh recognized implicitly that the First Amendment affords universities less leeway to restrict the speech of their adult students than it affords high schools for their minor students. *See Nuxoll*, 523 F.3d. at 647-75 ("This particular restriction, it is true, would not wash if it were being imposed on adults. . . ." (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995))).

Cir. 2003) (finding standing when no threat of prosecution because the "threat is latent in the existence of the statute").

The Seventh Circuit, consistent with this Court's precedents, required not some very specific "credible threat of enforcement" against Nuxoll, for the school never threatened him, but only the classic First Amendment injury of an objectively reasonable chill. *Cf.* App. 23-26a. It was enough that Nuxoll knew about policy, realized that it governed him and barred his speech, and self-censored his speech as a result.

Lopez is in the same position as Nuxoll, except that he provided even more evidence to merit Article III standing—uncontradicted threats of enforcement by District officials and students. Matteson used the exact terms of the speech code to shutdown Lopez's speech, withhold a grade, and threaten future punishment. App. 9-10a. Jones repeated the actual complaints of Lopez's fellow students and never assured Lopez would not be punished. App. 11-12a, 114-15a ¶ 51-53.

Lopez would have Article III standing in the Seventh Circuit. In the Ninth Circuit he does not.

D. The Fourth Circuit's Decision in *Rock for Life-UMBC v. Hrabowski*, No. 09-1892, 2010 WL 5189456 (4th Cir. Dec. 16, 2010) Aligns with the Ninth Circuit's Decision in this Case and Creates a Square 2-3 Split.

In *Rock for Life-UMBC v. Hrabowski*, No. 09-1892, 2010 WL 5189456, *6 (4th Cir. Dec. 16, 2010), the Fourth Circuit aligned itself with the Ninth Circuit and held that a registered student organization and two students lacked Article III standing to facially challenge University of Maryland, Baltimore County's sexual harassment policy despite being told their speech would violate the policy and despite testimony from the university's chief of police that he would enforce claims by "offended" students.

The plaintiffs in *Rock for Life* requested permission to erect a pro-life display on campus. *Id.* at *1. A university official told them they could not host the event because students might feel "emotionally harassed." *Id.* at *2. The sexual harassment policy was nearly identical to the one in this case. *See id.* (prohibiting "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance, or of creating an intimidating, hostile, or offensive educational or working environment . . ."). The plaintiffs alleged that the official's enforcement of the sexual harassment policy and the policy itself chilled their

ability to speak freely on pro-life issues that affect the sexes. The Fourth Circuit, in conflict with the Third, Sixth, and Seventh Circuits, held the plaintiffs lacked standing to challenge the harassment policy on its face because a chill upon student speech did not amount to injury-in-fact. *Id.* at *6. *But see Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003) (holding middle school student had standing to facially challenge dress code that was never applied to him because he was subject to it at all times on campus).

E. The Ninth Circuit's Decision Conflicts with Similar Decisions in the First, Second, Fifth, Eleventh, and District of Columbia Circuits.

If one broadens the analysis beyond the university campus, it is plain that the Ninth Circuit's decision is a doctrinal outlier. Indeed, the decision below conflicts with the decisions of the First, Second, Fifth, Eleventh, and District of Columbia Circuits that a litigant has Article III standing to challenge a law on its face by alleging that the law restricts his speech and has objectively chilled his speech.

In *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996), the First Circuit held that a political action committee suffered an injury-in-fact sufficient to confer Article III standing to facially challenge a law that capped political campaign expenditures. The PAC had standing because the law restricted "expressive activity by the class to which the plaintiff belongs." *Id.* at 15. In

that circumstance, the First Circuit determined "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.*

In *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992), the City College of the City University of New York created an ad hoc committee to study how much free speech professors should have in and outside the classroom after a professor wrote two letters and a book review containing racist comments. The committee had no power to punish the professor, but the university president did. *Id.* The Second Circuit held that the professor had Article III standing to challenge the committee's actions because they were implied threats and chilled the professor's speech. *Id.* It was not fatal to the professor's standing that no formal threats were ever issued because "[i]t is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat." *Id.* at 89-90. *See also Green Party of Conn. v. Garfield*, 616 F.3d 213, 242-43 (2d Cir. 2010) (holding that a minority political party had Article III standing to challenge campaign finance laws because some of the laws might apply to the political party if it ever raised enough funds).

In *Fairchild v. Liberty Independent School District*, 597 F.3d 747, 755 (5th Cir. 2010), the Fifth Circuit held a discharged teacher's aide had Article III standing to facially challenge the school district's policy of disallowing public comment about specific employees during governing board meetings because the policy chilled the plaintiff's speech. *See id.* at

754-55 ("Chilling a plaintiff's speech is a consti utional harm adequate to satisfy the injury-in-fact requirement.").

In *Pittman v. Cole*, 267 F.3d 1269, 1282-84 (11th Cir. 2001), an Alabama regulatory commission issued an opinion stating that candidates for judicial office would violate the canons of ethics if they answered candidate questionnaires with any answer other than "decline." The Christian Coalition, which submitted questionnaires to all judicial candidates, and three candidates who wanted to answer the questions, challenged the opinion on its face. *Id.* at 1276. The Eleventh Circuit found that the plaintiffs suffered an injury because their First Amendment rights were chilled by the potential for them to be punished for violating the opinion. *Id.* at 1284.

In *Chamber of Commerce v. FEC*, 69 F.3d 600, 601 (D.C. Cir. 1995), the plaintiffs facially challenged a Federal Election Commission rule that limited who organizations can communicate with concerning political messages and solicitations. Plaintiffs argued they altered their actions and speech because of the rule's chilling effect. *Id.* at 603. The District of Columbia Circuit held the plaintiffs had suffered an injury-in-fact because the mandatory nature of the rule bound their actions, resulting in a chill upon their speech. *Id.* at 603-04.

In short, there is a square 2-3 split on the precise question presented here—whether a student whose speech is objectively chilled by the speech code of the university he or she attends has standing to

challenge it under the First Amendment. What is more, many cases from other contexts confirm that—the Ninth and Fourth Circuits' are the doctrinal outliers. This disagreement can only be resolved through the intervention of this Court. This Court should grant review to clarify the confusion.

II. This Case Is an Ideal Vehicle Through Which this Court Can Address an Issue of Exceptional National Importance.

This Court's jurisprudence recognizes the public university as a "marketplace of ideas." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Yet overbroad and vague restrictions on student speech at public colleges and universities are a nationwide epidemic that threatens debate and discourse in our most vital educational institutions. Federal courts across the country have responded to the threat by *uniformly* striking down college speech codes on their face and as-applied. Pre-enforcement overbreadth challenges, as in this case, are essential to protecting the free speech of students. Indeed, the vigorous preservation of the "marketplace of ideas" depends on the First Amendment's permissive Article III standing doctrine. However, the conflict among the circuits, demonstrated by the split between the Ninth and Fourth Circuits on one side, and the Third, Sixth, and Seventh Circuits on the other side, means that some college students are more free to speak than others, based merely on the geographic location of their institutions.

A. Public University Speech Codes Are a National Epidemic that Threaten the American University's Unique Status as the "Marketplace of Ideas."

""The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'" *Keyishian*, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). For that reason, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.*

Written over forty years ago, these words remain a clarion call for a particular vision of the American public university—as a "marketplace of ideas," *Healy*, 408 U.S. at 180, a place where students learn not what to think, but how to think, a place where our civilization transmits the essential values of liberty and free inquiry. Unfortunately, this vision of liberty has been under sustained assault.

For more than twenty years, universities have too often attempted to marginalize and exclude students that are outside the political mainstream of campus. Alan Charles Kors & Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Harper, 1999). Perhaps the most pernicious and persistent of the various methods of campus censorship is the speech code. Designed to broadly prohibit so-called "offensive" or "harassing" communications, these codes have

chilled free speech at campuses from coast to coast. *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 390-405 (2009); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 33-35 (2008). Facially vague and overbroad, they deter untold thousands of students from speaking freely on critical issues of race, gender, sexuality, and religion. Arbitrarily enforced, they tend to become weapons of the dominant political culture, wielded against dissenters in an effort to replace the "marketplace of ideas" with an ideological monopoly.

According to the non-partisan Foundation for Individual Rights in Education, which conducts the leading annual study on university speech policies, nearly seventy percent of public colleges and universities enforce an unconstitutional speech code against their students. *Spotlight on Speech Codes 2011: The State of Free Speech on Our Nation's Campuses* 6 (2011), *available at* http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf?direct (last visited Mar. 15, 2011). The unique nature of the public university campus, where students often live on campus or spend most of their time there, means that students are often subject to these policies virtually every moment of their waking lives. *McCauley*, 618 F.3d at 247. Every on-campus human interaction is regulated. And colleges are expanding the scope of these

policies to restrict even off-campus and internet speech.[8]

Universities often argue that their speech codes are nothing more than legislatively and judicially approved harassment policies, as Respondents argued below. But the terms of these policies are much broader and enable colleges to restrict much more than sexual or racial harassment. The subjectivity built into these codes allows colleges to punish speech based on the motivations of the speaker or the subjective reaction of listeners. Most college harassment policies violate this Court's holding in *Davis v. Monroe County Board of Education*, 526 U.S. at 651, by allowing colleges to restrict harassment that is not severe, pervasive, or objectively offensive.

Left in place, these speech codes allow colleges to selectively prohibit unpopular speech, like that of Lopez, based on the subjective whims of listeners or administrators. The District's speech code is one of the most egregious forms of the speech code, as it instructs students to self-censor their speech if they think it *might* "offend" someone. Thus, students are left in free speech limbo as they question whether their speech will result in punishment, and the "marketplace of ideas" disintegrates.

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[8] *See* Darryn Cathryn Beckstrom, Comment, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261 (2008) (discussing the rise of public university student conduct codes that regulate student speech off-campus and on the internet).

B. Courts Uniformly Strike Down University Speech Codes When They Are Able to Reach the Merits.

From the inception of speech codes in the 1980s, courts have uniformly struck them down as unconstitutional. *See McCauley*, 618 F.3d at 250, 252; *DeJohn*, 537 F.3d 301; *Saxe*, 240 F.3d at 217; *Dambrot*, 55 F.3d at 1185; *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Coll. Republicans at S.F. State Univ.*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.).

This combination of circuit and district precedent should have ended speech codes at universities across the nation, yet they persist. Until the District Court entered an injunction in this case, the District and LACC maintained a sexual harassment policy that used language nearly identical to that struck down in *DeJohn*, *Saxe*, *Dambrot*, and other cases. But the Ninth Circuit's requirement that students demonstrate actual enforcement of the policy to establish an injury-in-fact sufficient for a facial

challenge effectively bars courts from confronting the merits of these unconstitutional policies, unless the rare student risks punishment (academic career) to raise a challenge.

III. The Court Should Grant the Petitions in Both This Case and in *Rock for Life v. Hrabowski* (filed March 16, 2011).

The student organization in *Rock for Life* also filed a petition for writ of certiorari in this Court today. The complementary facts in *Rock for Life* and this case militate in favor of granting both petitions so that this Court can fully resolve the problem and provide guidance to the lower federal courts.

CONCLUSION

Students should not enjoy different constitutional rights based solely on the location of their college. Jonathan Lopez's petition for writ of certiorari should be granted, and this Court should intervene to establish uniform Article III standing guidelines that afford maximum protection for the marketplace of ideas on campus.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN LOPEZ,
Plaintiff-Appellee,

v.

KELLY G. CANDAELE, in his individual and official capacities as member of the Los Angeles Community College District Board of Trustees; MONA FIELD, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; GEORGIA L. MERCER, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; NANCY PEARLMAN, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; ANGELA J. REDDOCK, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; MIGUEL SANTIAGO, in his individual and official

capacities as member of the Los Angeles Community College District Board of Trustees; SYLVIA SCOTT-HAYES, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; GENE LITTLE, in his individual and official capacities as Director of the Los Angeles Community College District Office of Diversity Programs; JAMILLAH MOORE, in her individual and official capacities as President of Los Angeles City College; ALLISON JONES, in her individual and official capacities as Dean of Academic Affairs at Los Angeles City College; CRISTY PASSMAN, in her individual and official capacities as Compliance Officer at Los Angeles City College,

Defendants-Appellants.

and

JOHN MATTESON, in his individual and official capacities as Professor of Speech at Los Angeles City College,

Defendant.

No. 09-56238

D.C. No. 2:09-cv-00995-GHK-FFM

ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted
March 3, 2010—Pasadena, California

Filed September 17, 2010
Amended December 16, 2010

Before: Ronald M. Gould, Sandra S. Ikuta and
N. Randy Smith, Circuit Judges.

Opinion by Judge Ikuta

COUNSEL

Mary L. Dowell and David A. Urban, Liebert Cassidy Whitmore, P.C., Los Angeles, California, for the appellants.

David J. Hacker and Heather G. Hacker, Alliance Defense Fund, Folsom, California; David A. French, Alliance Defense Fund, Columbia, Tennessee, for the appellee.

Sam Kim and Michael L. Parker, Sam Kim and Associates, P.C., Buena Park, California, for the appellee.

ORDER

The opinion filed September 17, 2010, is amended as follows:

At Slip Op. 14377, line 17: Before "Because Lopez fails to establish . . . " insert: <Nor does the recent Third Circuit decision in *McCauley v. University of Virgin Islands*, 618 F.3d 232, 238-39 (3rd Cir. 2010), alter this conclusion. *McCauley* held that a student disciplined for violating a provision in the student code of conduct had standing to bring a First Amendment challenge not only to that provision, but also to other provisions that had not caused him any injury, on the ground that they had the potential to chill the speech of other students. *Id.* at 238. Although the Supreme Court has held that plaintiffs may raise the First Amendment rights of third parties in certain narrow circumstances (namely, where plaintiffs have suffered an injury, but not an injury to their First Amendment rights, *see, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988)), the Court has never deviated from its rule that "[t]o bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some threatened or actual injury resulting from the putatively illegal action." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (internal quotations omitted). *See, e.g., Munson.*, 467 U.S. at 955 (holding that even when a plaintiff has satisfied the case or controversy requirement of Article III because he "suffered both threatened and actual injury as a result of the statute," a plaintiff generally "cannot rest his claim to relief on the legal rights or interests of third parties"; however, in the First Amendment context "where the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert

the rights of another . . . ."); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."). To the extent *McCauley* can be interpreted as holding that a plaintiff who has not demonstrated any injury in fact has standing to bring a First Amendment challenge on behalf of third parties, it is inconsistent with Supreme Court precedent, and we decline to follow it. >

No future petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

IKUTA, Circuit Judge:

Today we consider a student's First Amendment challenge to a community college sexual harassment policy. First Amendment cases raise "unique standing considerations," *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), that "tilt[ ] dramatically toward a finding of standing," *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Despite this lowered threshold for establishing standing and the disturbing facts of this case, we conclude that the student failed to make a clear showing that his intended speech on religious topics gave rise to a specific and credible threat of adverse action from college officials under the college's sexual harassment policy. Because the

student failed to carry the burden of proving he suffered an injury in fact, he does not satisfy the "irreducible constitutional minimum of standing" necessary to challenge the policy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

I

For the limited purpose of reviewing the preliminary injunction at issue, the salient facts are undisputed.

A

In the fall of 2008, plaintiff Jonathan Lopez was a student at Los Angeles City College (LACC), which is one of the public colleges within the Los Angeles Community College District (the District). At the time Lopez attended LACC, the District had promulgated a sexual harassment policy comprising a chapter of the District's "Board Rules and Administrative Regulations," as authorized under state law. *See* Cal. Educ. Code §§ 66300, 70902. LACC is subject to the District's regulations, including its sexual harassment policy. Two sections of this sexual harassment policy are relevant here. Section 15001 sets forth the District's general policy on this issue, stating in relevant part:

> The policy of the Los Angeles Community College District is to provide an educational, employment and business environment free from unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communications constituting sexual harassment. Employees, students, or other

> persons acting on behalf of the District who engage in sexual harassment as defined in this policy or by state or federal law shall be subject to discipline, up to and including discharge, expulsion or termination of contract.

Section 15003(A) defines "sexual harassment" as including:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: . . . (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.[1]

According to the policy, the District's Director of Affirmative Action Programs oversees the implementation of the sexual harassment policy, but

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[1] The defendants argue that this version of the sexual harassment policy is no longer applicable, as it was superseded in 2007 by a new policy that redefined the term "sexual harassment," and therefore Lopez's challenge is moot. We do not reach this argument, because we decide the case on standing grounds. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (holding that there is "no mandatory sequencing of jurisdictional issues," and we have "leeway to choose among threshold grounds for denying audience to a case on the merits" (citations and internal quotation marks omitted)).

may delegate these duties to an individual Sexual Harassment Compliance Officer. District officials may take disciplinary action only in accordance with due process rights as well as any applicable collective bargaining agreement. For students, "disciplinary action" ranges from verbal warnings to expulsion. For employees, "disciplinary action" ranges from verbal warnings to dismissals. According to Allison Jones, LACC's Dean of Academic Affairs, neither LACC nor the District has enforced the sexual harassment policy against any teacher, student or employee. Lopez does not dispute this statement.

Sections 15001 and 15003 of the policy appear in various other official documents. For example, the quoted portion of Section 15001 appears twice in the LACC student handbook. The "Rules for Student Conduct" section of the handbook states that "[s]tudent conduct in all of the Los Angeles Community Colleges must conform to District and [LACC] rules and regulations," and that violations will result in disciplinary action. In addition, the website of the District's Office of Diversity Programs contains relevant portions of Section 15003, and gives some examples of sexual harassment, including "[v]erbal harassment," "[d]isparaging sexual remarks about your gender," "[d]isplay of sexually suggestive objects, pictures, cartoons, posters, screen savers," and "[m]aking unwelcome, unsolicited contact with sexual overtones (written, verbal, physical and/or visual contact)." The website also offers "[s]imple guidelines for avoiding sexual harassment," which include the admonition, "If [you

are] unsure if certain comments or behavior are offensive do not do it, do not say it." The LACC Compliance Office's website likewise includes the relevant portions of Section 15003, and defines one form of sexual harassment as "generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex."

B

During the fall semester, Lopez was a student in Speech 101, taught by Professor John Matteson. For one assignment, Matteson directed his students to make an informative speech on a topic of their choosing. Lopez is a devout Christian who believes, as a tenet of his faith, that he must share his religious beliefs with others. For this assignment, Lopez chose to speak about God and the ways in which he had witnessed God act both in his life and in the lives of others. In the course of giving his speech, Lopez read a dictionary definition of marriage as being a union between a man and a woman, and read two verses from the Bible.[2] After

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[2] Though the text of Lopez's speech is not in the record, Lopez's appellate brief states that the speech quoted *Romans* 10:9 ("[t]hat if you confess with your mouth, 'Jesus is Lord,' and believe in your heart that God raised Him from the dead, you will be saved;") and *Matthew* 22:37-38 ("Jesus said to him, 'You

Lopez made these statements, but while still in the middle of his speech, Matteson interrupted Lopez, called Lopez a "fascist bastard," and refused to allow Lopez to finish his speech. Matteson told the class that anyone who was offended could leave. When no one left, Matteson dismissed the class. In lieu of giving Lopez a grade, Matteson wrote on Lopez's speech evaluation form, "[a]sk God what your grade is" and "pros[elytising] is inappropriate in public school."

The day after this incident, Lopez met with Jones to complain about Matteson's actions. As Dean of Academic Affairs, Jones supervises the LACC faculty and oversees certain student matters and the policies and procedures that govern LACC. Jones told Lopez to put his complaint against Matteson in writing. When Lopez delivered his written complaint to Jones, Matteson observed this interaction. Matteson subsequently threatened Lopez, stating that he would make sure that Lopez was expelled from school.

On December 2, the day after this threat, Lopez turned in another Speech 101 assignment. Lopez's paper contained a list of proposed topics for a persuasive speech, including one on how to "exercise your freedom of speech right," which would include a discussion of how one should "[a]lways stand up for what you believe in." Matteson gave Lopez an "A" for this assignment, but wrote the following below the

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shall love the Lord your God with all your heart, with all your soul, and with all your mind.' This is the first and greatest commandment.").

"free speech" proposed topic: "(Remember — you agree to Student Code of Conduct as a student at LACC)."

By this time, Lopez had obtained legal representation. On the same day that Lopez submitted his list of proposed topics, Lopez's lawyer sent Jones and Jamillah Moore, the LACC President, a letter demanding that Lopez receive a fair grade on his informative speech, that LACC discipline Matteson and require him to make a public apology to Lopez, and that LACC and its faculty provide written assurance that they would respect Lopez and other students' First Amendment rights.

Jones responded by letter two days later. The letter stated that Jones had met with Lopez twice and had asked him to put his complaints in writing and submit written corroboration of his version of the informative speech incident from other students in the class. The letter also stated that Jones had started a "progressive discipline process" with respect to Matteson, but that both collective bargaining rules and LACC's restrictions on discussing personnel matters prevented her from disclosing details about any discipline that Matteson might receive. The letter made clear that "action is being taken, but specific details may not be shared with Mr. Lopez or [his lawyer]."

The same letter also reported that Jones had received statements from two students who were "deeply offended" by Lopez's informative speech. One

student wrote that Lopez's speech "was not of the informative style that our assignment called for, but rather a preachy, persuasive speech that was completely inappropriate and deeply offensive." The student further stated that although she respected Lopez's right to free speech, "I also do not believe that our classroom is the proper platform for him to spout his hateful propaganda." The second student wrote that "I don't know what kind of actions can be taken in this situation, but I expect that this student should have to pay some price for preaching hate in the classroom." After quoting the two statements, however, the letter stated:

> [r]egardless of the other students' reactions to Mr. Lopez'[s] speech, Mr. Matteson will still be disciplined. First amendment rights will not be violated as is evidenced by the fact that even though many of the students were offended by Mr. Lopez'[s] speech, no action will be taken against any of them for expressing their opinions.

The letter also stated that Lopez would receive a "fair grade" for both his informative speech and for the entire class.

Lopez eventually received an "A" in the class, though he alleged he never received a grade for his informative speech. In a subsequent affidavit, Jones disavowed Matteson's actions, declaring that Matteson's behavior was spontaneous and not in accordance with any LACC or District "handbooks, regulations[,] and codes." The affidavit also

confirmed that "Matteson was disciplined for [his] conduct." Lopez had no subsequent interactions with Matteson, and the record contains no other complaints or other allegations of enforcement actions taken against Lopez due to his speech. Nor did the District or LACC take any enforcement action against Lopez under the sexual harassment policy.

C

Lopez ultimately filed suit against Matteson, Jones and other District and college officials.[3] Lopez brought four causes of action against the Defendants under 42 U.S.C. § 1983. The first three causes of action alleged that Matteson's conduct violated Lopez's First Amendment and equal protection rights. In his fourth cause of action, the only one relevant here, Lopez claimed that the District's sexual harassment policy violated the First Amendment because it was unconstitutionally overbroad and vague.[4]

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[3] In addition to Matteson and Jones, Lopez sued Moore, the president of LACC, Cristy Passman, the LACC Compliance Officer, Gene Little, Director of the District's Office of Diversity Programs, and the District's Board of Trustees (Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, and Sylvia Scott- Hayes.) Except for Matteson, who is not a named defendant in this appeal, we refer to the defendants by name or collectively as Defendants.

[4] Matteson failed to respond to Lopez's complaint, and as such the district court clerk entered default; however, the district court delayed granting a default judgment against Matteson until after this appeal is resolved.

Lopez moved for a preliminary injunction to enjoin the Defendants from enforcing the sexual harassment policy. In entertaining this motion, the district court first concluded that Lopez had standing to bring a facial challenge to the policy because it applied to Lopez by virtue of his enrollment at LACC, the policy likely reached the speech in which Lopez wanted to engage, and Lopez has censored himself for fear of discipline under the policy.[5] The district court then concluded that the policy was unconstitutionally overbroad and could not be narrowed, and granted Lopez's motion to enjoin the District from enforcing the policy. While this appeal of the court's preliminary injunction was pending, the district court granted the Defendants' previously filed motion to dismiss the remaining causes of action, with limited leave for Lopez to amend.

II

We review *de novo* the district court's determination that Lopez has standing. *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 506 (9th Cir. 1992). Lopez bears the burden of establishing standing because he is the party invoking federal jurisdiction. *LSO*, 205 F.3d at 1152. We review the district court's grant of a preliminary injunction for abuse of discretion. *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009). "This review is 'limited and deferential' and it does not extend to the underlying merits of the case." *Id.*

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[5] The district court therefore did not reach Lopez's as-applied challenge.

(quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)).

A

[1] In order to invoke the jurisdiction of the federal courts, a plaintiff must establish "the irreducible constitutional minimum of standing," consisting of three elements: injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff's alleged injury. *Lujan*, 504 U.S. at 560-61; *see Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003). The injury in fact must constitute "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotations omitted). The plaintiff must prove injury in fact "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Therefore, at the preliminary injunction stage, a plaintiff must make a "clear showing" of his injury in fact. *Winter v. Natural Resources Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008).

[2] Because "[c]onstitutional challenges based on the First Amendment present unique standing considerations," plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction. *Bayless*, 320 F.3d at 1006. "In an effort to avoid the chilling effect of sweeping

restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Id.*; *Getman*, 328 F.3d at 1094. In such pre-enforcement cases, the plaintiff may meet constitutional standing requirements by "demonstrat[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see LSO*, 205 F.3d at 1154. To show such a "realistic danger," a plaintiff must "allege[ ] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298; *see Bayless*, 320 F.3d at 1006; *LSO*, 205 F.3d at 1154-55.

[3] Despite this "relaxed standing analysis" for preenforcement challenges, *Canatella v. California*, 304 F.3d 843, 853 n.11 (9th Cir. 2002), plaintiffs must still show an actual or imminent injury to a legally protected interest. *See Lujan*, 504 U.S. at 560. Even when plaintiffs bring an overbreadth challenge to a speech restriction, i.e., when plaintiffs challenge the constitutionality of a restriction on the ground that it may unconstitutionally chill the First Amendment rights of parties not before the court, they must still satisfy "the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004) (quoting *4805 Convoy, Inc. v. City*

of San Diego, 183 F.3d 1108, 1112 (9th Cir. 1999)); *see also Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). The touchstone for determining injury in fact is whether the plaintiff has suffered an injury or threat of injury that is credible, not "imaginary or speculative." *Babbitt*, 442 U.S. at 298 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

We look at a number of factors to determine whether plaintiffs who bring suit prior to violating a statute, so-called "preenforcement plaintiffs," have failed to show that they face a credible threat of adverse state action sufficient to establish standing. As discussed in more detail below, in this context we have conducted three related inquiries. First, we have considered whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them. Second, we have considered whether the plaintiffs have failed to establish, with some degree of concrete detail, that they intend to violate the challenged law. We have also considered a third factor, whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the government. Such inapplicability weighs against both the plaintiffs' claims that they intend to violate the law, and also their claims that the government intends to enforce the law against them.

B

Beginning with the first factor, we have considered a government's preliminary efforts to enforce a speech restriction or its past enforcement

of a restriction to be strong evidence (although not dispositive, *LSO*, 205 F.3d at 1155) that preenforcement plaintiffs face a credible threat of adverse state action. For example, a threat of government prosecution is credible if the government has indicted or arrested the plaintiffs, *Younger*, 401 U.S. at 41-42, if "prosecuting authorities have communicated a specific warning or threat to initiate proceedings" under the challenged speech restriction, or if there is a "history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff established injury in fact where the government twice warned him to stop distributing handbills and threatened him with prosecution under a Georgia statute if he continued to distribute the handbills); *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 616, 618 (9th Cir. 1999) (per curiam) (plaintiff had established injury in fact under a Nevada statute when the attorney general wrote a "precise and exact" letter to the union which quoted the statute in full and threatened to refer the prosecution to "local criminal authorities").

The threatened state action need not necessarily be a prosecution. *See, e.g., Meese v. Keene*, 481 U.S. 465, 472-73 (1987) (holding that the plaintiff established standing by proving harms flowing from the government's designation of three films as "political propaganda"); *Canatella*, 304 F.3d at 852-53 (holding that the plaintiff had standing to challenge state bar statutes and professional rules

where he had previously been subject to state bar disciplinary proceedings and could be subject to them in the future). Moreover, the plaintiffs themselves need not be the direct target of government enforcement. A history of past enforcement against parties similarly situated to the plaintiffs cuts in favor of a conclusion that a threat is specific and credible. *See Adult Video Ass'n v. Barr*, 960 F.2d 781, 785 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video Ass'n*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994).

[4] But "general threat[s] by officials to enforce those laws which they are charged to administer" do not create the necessary injury in fact. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947); *see Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1, 4 (9th Cir. 1974) (concluding that the sheriff's statement that "all of the laws of San Diego, State, Federal and County, will be enforced within our jurisdiction" was insufficient to create a justiciable case (citing, among other cases, *Poe v. Ullman*, 367 U.S. 497, 501 (1961))). Thus, where multiple plaintiffs challenged a California law that criminalized teaching communism, the Supreme Court concluded that three of the plaintiffs, who had not alleged that "they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," but merely that they felt "inhibited" in advocating political ideas or in teaching about communism, did not have standing. *Younger*, 401 U.S. at 42. Mere "[a]llegations of a subjective 'chill' are not an

adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Turning to the second factor, we have concluded that preenforcement plaintiffs who failed to allege a concrete intent to violate the challenged law could not establish a credible threat of enforcement. Because "the Constitution requires something more than a hypothetical intent to violate the law," plaintiffs must "articulate[ ] a 'concrete plan' to violate the law in question" by giving details about their future speech such as "when, to whom, where, or under what circumstances." *Thomas*, 220 F.3d at 1139. The plaintiffs' allegations must be specific enough so that a court need not "speculate as to the kinds of political activity the [plaintiffs] desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication." *Mitchell*, 330 U.S. at 90. For example, a plaintiff challenging the licensing provisions of a state regulatory regime failed the injury in fact requirement because the plaintiff "ha[d] never indicated that it intends to pursue another license," and therefore could not "assert that it will ever again be subject to the licensing provisions." *4805 Convoy*, 183 F.3d at 1112-13; *see also, e.g., Thornburgh*, 970 F.2d at 510 (organization does not have standing when the only evidence that it would be subject to a law penalizing membership in an alleged terrorist group was that its members received two publications which espoused the terrorist group's views). By contrast, plaintiffs may carry their burden of establishing injury in fact when they

provide adequate details about their intended speech. *See, e.g.*, *ACLU v. Heller*, 378 F.3d 979, 984 (9th Cir. 2004) (holding that a group had standing when an individual member alleged he desired to produce and distribute flyers regarding a specific ballot initiative); *Getman*, 328 F.3d at 1093 (holding that a group had standing when the group showed, among other things, that it had planned to spend over $1000 to defeat a specific California proposition in the November 2000 election). Without these kinds of details, a court is left with mere " 'some day' intentions," which "do not support a finding of the 'actual or imminent' injury that our cases require." *Thomas*, 220 F.3d at 1140 (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996)).

[5] Finally, we have indicated that plaintiffs' claims of future harm lack credibility when the challenged speech restriction by its terms is not applicable to the plaintiffs, or the enforcing authority has disavowed the applicability of the challenged law to the plaintiffs. In the First Amendment context, "a fear of prosecution will only inure if the plaintiff's intended speech arguably falls within the statute's reach." *Getman*, 328 F.3d at 1095 (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988)). Thus, in *Leonard v. Clark*, we held that individual firemen did not have standing to challenge a portion of their union's collective bargaining agreement because the provision at issue "by its plain language applie[d] only to the Union and not to its individual members." 12 F.3d 885, 888-89 (9th Cir. 1994); *see also Getman*, 328 F.3d at 1095

(indicating that a plaintiff has not established an injury in fact where the statute "clearly fails to cover [the plaintiff's] conduct" (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003))).

Likewise, we have held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities. Thus, a group of school teachers did not have standing to challenge an Oregon textbook selection statute when both the Oregon Attorney General and the school district's lawyer "disavowed any interpretation of [the statute] that would make it applicable in any way to teachers." *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983); *cf. LSO*, 205 F.3d at 1155 (collecting cases where the government failed to affirmatively disavow an intent to enforce a challenged statute). Of course, the government's disavowal must be more than a mere litigation position. *See Thornburgh*, 970 F.2d at 508 (holding that aliens had standing to challenge speech restriction statutes, even though the government dropped charges based on those statutes four days before the district court hearing, because, among other things, the government could easily reinstate those charges and was bringing similar charges against other aliens).

III

We apply these principles to the facts of this case to determine whether Lopez has carried his burden of making a clear showing of injury in fact. *See Winter*, 129 S. Ct. at 376; *Lujan*, 504 U.S. at 560.

Lopez claims he suffered such an injury because he faced a specific, credible threat of adverse state action under the District's sexual harassment policy.

A

Lopez identifies three actions on the part of LACC employees that, he claims, constitute a credible threat. According to Lopez, Matteson threatened to enforce the sexual harassment policy against him first on November 24, when Matteson interrupted Lopez's informative speech and told the class that they could leave if they were "offended," and second on December 2, when Matteson wrote on Lopez's assignment that Lopez had agreed to the "Student Code of Conduct" as a student at LACC. Third, Lopez claims that Jones's letter constituted a threat to enforce the policy because it informed Lopez that his speech had offended other students. We consider each incident in turn.

[6] In the November 24 incident, Matteson aggressively abused Lopez for his statements regarding marriage, prevented Lopez from speaking, asked whether other students were offended, and warned Lopez against proselytizing in school. However, Matteson did not threaten to enforce the sexual harassment policy against Lopez or even suggest that Lopez was violating the policy. Therefore the November 24 incident, while raising serious concerns, does not help Lopez carry his burden of clearly showing he suffered an injury in fact from the sexual harassment policy. Lopez argues that because Matteson told students they could leave if they were "offended," and Section 15003(A) defines

"sexual harassment" as including conduct that has the purpose or effect of creating an "offensive work or educational environment," Matteson was implicitly invoking the District's sexual harassment policy. We conclude that any link between Matteson's use of the word "offended" and the sexual harassment policy's use of the word "offensive" in this context is too attenuated and remote to rise to the level of "a threat of specific future harm" required to show an injury in fact arising from the policy. *Cf. Laird*, 408 U.S. at 14 (requiring such a threat in order to avoid advisory opinions); *Del Papa*, 200 F.3d at 616, 618 (holding that a "precise and exact" threat of prosecution was more than adequate to establish injury in fact).

[7] The December 2 incident involved a different assignment Lopez had written for Speech 101. It is plausible to read Matteson's comment on the paper, namely that Lopez had agreed to abide by the Student Code of Conduct,[6] as an implicit threat that Lopez should take care not to raise certain topics (such as those relating to marriage as being between a man and a woman, which had elicited Matteson's ire previously), and that such topics could violate the school's policies. Again, however, such an implied threat does not meet the standard necessary to show injury in fact. This assignment did not mention Lopez's religious beliefs or discuss the nature of

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[6] Although there is no document entitled "Student Code of Conduct" in the record, we assume for purposes of this analysis that the comment refers to the "Rules for Student Conduct" section of the LACC student handbook, which also contains Section 15001 of the sexual harassment policy.

marriage, and on its face, Matteson's comment does not indicate that Lopez's speech on marriage or religion would constitute sexual harassment or otherwise violate the sexual harassment policy. Nor does Matteson's comment constitute a threat to initiate proceedings if Lopez made such remarks on marriage or religion. Rather, in the context in which this remark appeared, Matteson's comment is, at most, a "general threat" to enforce the Student Code of Conduct, rather than a "direct threat of punishment." *Mitchell*, 330 U.S. at 88. Such general threats are insufficient to establish an injury in fact.

[8] Finally, Lopez argues that Jones's December 4 letter is a threat to enforce the sexual harassment policy by taking action against him. Lopez points to the letter's statement that two students were offended by Lopez's speech, and one student wrote that the speech was "hateful propaganda." Read in context, however, Jones's letter does not constitute a threat of enforcement action. The letter makes clear that Matteson, not Lopez, is the target of the LACC's disciplinary actions, and states that LACC will not take action against any students, impliedly including Lopez, for exercise of their First Amendment rights. Moreover, while Jones makes the rejoinder to Lopez's attorney that two other students were offended by Lopez's speech, the students she quotes do not complain about statements of a sexual nature or suggest they regarded Lopez's speech as constituting sexual harassment; rather, they complained that Lopez's informative speech was "hateful" or "preached hate." We therefore agree with the district court's later conclusion that "the

content of [Jones's] letter cannot reasonably be characterized as threatening future punishment on the basis of such [student] complaints."

[9] Even when we view Jones's letter and the two Speech 101 incidents collectively, they do not constitute a credible threat to discipline Lopez under the sexual harassment policy. No LACC official or student invoked or even mentioned the policy, nor did anyone suggest that Lopez's November 24 speech constituted sexual harassment. Indeed, even the demand letter Lopez's attorney sent to LACC did not reference that policy. While Matteson and the students quoted in Jones's letter apparently were offended or angered by Lopez's November 24 speech in class, there is no indication that they, or anyone else, deemed it to be sexual harassment.

B

Other factors likewise indicate that Lopez's claims of threatened enforcement are not sufficiently concrete to meet even the minimum injury in fact threshold. As noted above, we consider both Lopez's stated intent to violate the policy and the likelihood that the District or LACC will enforce the policy against Lopez.

[10] Here Lopez has not adequately proven his intent to violate the policy because Lopez has not shown that the sexual harassment policy even arguably applies to his past or intended future speech. *See Getman*, 328 F.3d at 1095 (plaintiff must show that his "intended speech arguably falls within

the statute's reach"). As we previously explained, the District's policy (per Sections 15001 and 15003(A)) precludes students from engaging in sexual harassment, which, in its most wide-reaching formulation, includes "verbal, visual, or physical conduct of a sexual nature" that has the purpose or effect of creating a "hostile or offensive work or educational environment." Lopez's November 24 speech included quotes from two Bible passages relating to salvation and the love of God, and a dictionary definition of marriage as "between a man and a woman." Lopez has given us few details about his intended future speech: he alleges only that in the future, he desires to discuss "his Christian views on politics, morality, social issues, religion, and the like," and that he wishes to "share[ ] his beliefs about Christianity with others," which means "discuss[ing] his faith and how it applies to guide his views on political, social, and cultural issues and events." Comparing Lopez's past and proposed future speech to the plain language of the District's sexual harassment policy, we do not see, nor does Lopez explain, how the policy applies to him, given that his statements and proposed topics do not, on their face, constitute "verbal . . . conduct of a sexual nature." While the District Office of Diversity Programs and LACC Compliance Office websites suggest broader definitions of sexual harassment than contained in Section 15003(A), Lopez's speech on topics of religious concern does not, on its face, meet even those broader definitions, which focus on conduct or expression specifically related to sex (e.g., classifying as sexual harassment the "[d]isplay of sexually suggestive objects, pictures, cartoons, posters, [or]

screen savers," or "[d]isparaging sexual remarks about [one's] gender"). Lopez does not argue otherwise. In short, Lopez has not shown how his past or intended speech would violate the challenged policy.

[11] Even if we assume (though Lopez does not argue) that Lopez intends to express religious opposition to homosexuality or same sex marriages, and even if we also assume (which again, Lopez does not argue) that college officials, teachers or students could adopt a strained construction of the sexual harassment policy that would make it applicable to religious speech opposing homosexuality or gay marriage, Lopez does not claim that anyone has done so or may do so in the future. In the absence of any argument by Lopez urging this point, we decline to give the policy such an interpretation on our own accord. Moreover, nothing in the record suggests that the District or LACC has adopted an expansive reading of the policy. Rather, Jones's uncontroverted statement that the District or LACC have never charged any teacher, student, or employee with sexual harassment under the policy points in the opposite direction. In the absence of any showing that the sexual harassment policy even arguably applies or may apply to Lopez's past or intended future speech, Lopez cannot show a concrete intent to violate the policy, and therefore cannot show a credible threat that the Defendants will enforce the policy against him.

For this reason, Lopez's reliance on *Santa Monica Food Not Bombs v. City of Santa Monica* (*Food Not*

Bombs), 450 F.3d 1022 (9th Cir. 2006) and *Bayless*, 320 F.3d 1002, is misplaced. In those cases, we held that an organization can establish injury in fact sufficient for pre-enforcement standing merely by showing that it altered its expressive activities to comply with the statutes at issue and alleging its apprehension that the relevant statutes would be enforced against it. *See Food Not Bombs*, 450 F.3d at 1034; *Bayless*, 320 F.3d at 1006. Lopez argues that he is similarly situated, because he has self-censored his speech on religious topics in order to avoid violating the sexual harassment policy. However, in *Bayless* and *Food Not Bombs*, the organizations proved they had a specific, concrete intent to engage in activities that were clearly barred by the challenged law. *See Food Not Bombs*, 450 F.3d at 1034 (holding that a plaintiff that organized marches and demonstrations had standing to challenge a Santa Monica ordinance that required it to obtain a permit before engaging in marches or demonstrations); *Bayless,* 320 F.3d at 1006 (holding that a right-to-life political action committee, whose primary purpose was to present political advertising, had standing to challenge a state election statute that placed limitations on political advertising within ten days before an election). By contrast, Lopez fails to allege, let alone offer concrete details such as those supplied in *Bayless* or *Food Not Bombs*, regarding his intent to engage in conduct expressly forbidden by the sexual harassment policy; he "cannot say when, to whom, where, or under what circumstances" he will actually give a speech that would violate the sexual harassment policy. *Thomas*, 220 F.3d at 1139.

We reach the same conclusion when we inquire whether the District or LACC will likely enforce the policy against Lopez. As noted above, the inapplicability of the plain language of the sexual harassment policy to Lopez's speech, and the absence of any official interpretation of the policy as applying to Lopez's speech, cut against the existence of a credible threat of enforcement. Moreover, Jones's letter indicated that LACC did not intend to take any action against Lopez. As noted above, the letter stated that Jones intended to address Lopez's complaints, discipline Matteson, and ensure that Lopez received a fair grade in the class. Further, the letter stated that although several students were offended by Lopez's speech, "First amendment rights will not be violated," and no action will be taken against any of the students, implicitly including Lopez. As Jones is the administration official with responsibility for overseeing college policies and procedures generally, her statement that no action will be taken against students for expressing their opinions is entitled to significant weight, and vitiates Lopez's claim that he faces a credible threat of enforcement. *Cf. LSO*, 205 F.3d at 1155 (concluding that "failure to disavow 'is an attitudinal factor the net effect of which would seem to impart some substance to the fears of plaintiffs' " (brackets omitted) (quoting *Thornburgh*, 970 F.2d at 508)). Nor is this a situation like *Thornburgh*, in which the government dropped charges "not because [the charges] were considered inapplicable, but for tactical reasons," 970 F.2d at 508, because here LACC had not taken any steps to enforce the sexual

harassment policy against Lopez, either before or after Lopez's threat to sue the school.

Although Lopez alleges that his speech was chilled by the existence of the sexual harassment policy, self-censorship alone is insufficient to show injury. *See, e.g., Laird*, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."); *Getman*, 328 F.3d at 1095 ("We do not mean to suggest that any plaintiff may challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute. The self-censorship door to standing does not open for every plaintiff."). Nor does Lopez have standing merely because, as the district court concluded, he may have "more than a general interest shared with the student body at large" in challenging the policy because he is a devout Christian. Leaving aside the question whether the sexual harassment policy has special applicability to Christians, the district court's conclusion is misguided: our inquiry into injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced against them. *See Babbitt*, 442 U.S. at 298-99.

[12] In sum, Lopez has not proposed an interpretation of the policy that would arguably apply to his intended speech and has not given any details about what he intends to say. Therefore, he has failed to prove his intent to violate the policy.

Moreover, Lopez has not shown that the District or LACC has enforced the sexual harassment policy against him, interprets the sexual harassment policy as applying to his speech, or is likely to enforce the policy against him in the future. Under these circumstances, we must conclude that Lopez fails to meet the standard required of a preenforcement plaintiff to prove injury in fact, because he has not met the low threshold of clearly showing that he faces a specific, credible threat of adverse government action based on a violation of the sexual harassment policy.

C

[13] Lopez also argues that the overbreadth doctrine allows him to assert the rights of his fellow students who are not before the court. However, Lopez properly recognized that he may only assert the rights of others "[s]o long as [he] satisfies the injury in fact requirement." Plaintiffs who have suffered no injury themselves cannot invoke federal jurisdiction by pointing to an injury incurred only by third parties. *See Munson*, 467 U.S. at 958 (noting that Munson could not assert the rights of third parties unless Munson itself had suffered an injury in fact). Nor does the recent Third Circuit decision in *McCauley v. University of Virgin Islands*, 618 F.3d 232, 238-39 (3rd Cir. 2010), alter this conclusion. *McCauley* held that a student disciplined for violating a provision in the student code of conduct had standing to bring a First Amendment challenge not only to that provision, but also to other provisions that had not caused him any injury, on

the ground that they had the potential to chill the speech of other students. *Id.* at 238. Although the Supreme Court has held that plaintiffs may raise the First Amendment rights of third parties in certain narrow circumstances (namely, where plaintiffs have suffered an injury, but not an injury to their First Amendment rights, *see, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988)), the Court has never deviated from its rule that "[t]o bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some threatened or actual injury resulting from the putatively illegal action." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (internal quotations omitted). *See, e.g., Munson.*, 467 U.S. at 955 (holding that even when a plaintiff has satisfied the case or controversy requirement of Article III because he "suffered both threatened and actual injury as a result of the statute," a plaintiff generally "cannot rest his claim to relief on the legal rights or interests of third parties"; however, in the First Amendment context "where the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another . . . ."); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."). To the extent *McCauley* can be interpreted as holding that a plaintiff who has not demonstrated any injury in fact

has standing to bring a First Amendment challenge on behalf of third parties, it is inconsistent with Supreme Court precedent, and we decline to follow it. Because Lopez fails to establish the necessary injury in fact, he cannot raise the claims of third parties as part of an overbreadth challenge.

IV

Formal and informal enforcement of policies that regulate speech on college campuses raises issues of profound concern. As we have noted in *Rodriguez v. Maricopa County Community College District*,

> If colleges are forced to act as the hall monitors of academia, subject to constant threats of litigation both from [those] who wish to speak and listeners who wish to have them silenced, "many school districts would undoubtedly prefer to 'steer far' from any controversial [speaker] and instead substitute 'safe' ones in order to reduce the possibility of civil liability and the expensive and time-consuming burdens of a lawsuit."

605 F.3d 703, 709 (9th Cir. 2010) (brackets omitted) (quoting *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1030 (9th Cir. 1998)). Such policies, well intentioned though they may be, carry significant risks of suppressing speech. "Because some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all," *id.* at 711, an outcome that would be anathema for universities, our nation's

"marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). Rather, the First Amendment protects a speaker's "freedom to express himself on . . . issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." *Rodriguez*, 605 F.3d at 708-09 (quoting *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)); *see also Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("To many, the immediate consequence of this freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.").

[14] Despite the serious concerns raised by policies that regulate speech on college campuses, we remain bound by the strictures of our jurisdiction, and must decline to hear cases where there is no genuine case or controversy. Under the relaxed standard applicable to First Amendment cases, Lopez's arguments come to the very edge of showing injury in fact. But Lopez has not made it over the threshold, and "[w]e will not manufacture arguments for [a party]." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). Taking the record and Lopez's arguments as we find them, we conclude that Lopez failed to make a clear showing of a specific and concrete threat that the sexual harassment policy would be enforced against him. While Lopez alleged a bruising encounter with Matteson, Lopez's suit against Matteson is not before us today, and neither Matteson nor any other Defendant ever invoked the District's sexual harassment policy against Lopez.

Lopez consequently does not have standing to challenge the District's sexual harassment policy. Therefore, the order granting the preliminary injunction is **REVERSED**, the preliminary injunction is **VACATED**, and we **REMAND** for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. CV 09-0995-GHK (FFMx)
Date November 6, 2009
Title *Jonathan Lopez, et al. v. Kelly G. Candaele, et al.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: (In Chambers) Order re:
Defendants' Motion for Dismissal

Plaintiff Jonathan Lopez ("Plaintiff"), a student at Los Angeles City College ("LACC"), has brought suit against Defendants, administrators for the Los Angeles Community College District ("District"),[1] pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the First and Fourteenth Amendments to the U.S. Constitution.

[1] The Defendants who are party to the Motion under consideration include Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, Sylvia Scott- Hayes, Gene Little, Jamillah Moore, Allison Jones, and Cristy Passman (collectively "Defendants").

Defendants seek to dismiss Plaintiff's claims of retaliation for exercise of free speech, and violation of his rights to freedom of expression and equal protection, contending that Plaintiff has failed to state a claim under Federal Rule of Civil Procedure 12(b)(6), and moreover, Defendants are protected by qualified immunity.

As the basis for Plaintiff's claim for First Amendment retaliation, Plaintiff asserts that "[b]y silencing [his] protected expression in a public forum, refusing to grade his presentation, prohibiting his expression of religious viewpoints, threatening enforcement of the speech code, and threatening to expel him, among other things, Defendants, acting under color of state law and according to policy and practice, have . . . retaliated against him because of his free expression." (Compl. ¶ 107). Plaintiff also alleges that Defendants' actions were content and viewpoint discriminatory, and "chilled [Plaintiff's] clearly established rights to freedom of speech and expression," in violation of the First Amendment. (*Id.* ¶ 111). Plaintiff's third claim alleges an equal protection violation, resulting from Defendants' alleged differential treatment of Plaintiff from similarly situated students "because of his membership in a protected class and because of his exercise of fundamental rights." (*Id.* ¶ 115). Plaintiff's fourth claim alleges that the District's Sexual Harassment Policy ("Policy"), in use at LACC, is unconstitutionally overbroad and vague.

I. Legal Standard for Motions to Dismiss Under Rule 12(b)(6)

In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must set forth "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

In considering a motion to dismiss, we must accept the allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). We may consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). We need not accept as true, however, legal conclusions "cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

II. First Amendment Retaliation

"To establish a First Amendment retaliation claim in the student speech context, a plaintiff must show that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006).

"In some cases, the would-be retaliatory action is so insignificant that it does not deter the exercise of First Amendment rights, and thus does not constitute an adverse [ ] action within the meaning of the First Amendment retaliation cases." *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003).[2] The crux of our determination on this Motion is identifying actions taken by the moving Defendants that are sufficient to qualify as retaliatory.[3] The Ninth Circuit in *Coszalter* provided a "more specific articulation of the standard set forth in previous First Amendment retaliation cases," explaining that an adverse action does not constitute a Section 1983 retaliation claim unless it is "reasonably likely to

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[2] *Coszalter* concerned retaliation in the context of public employment, but the Ninth Circuit has expressly applied the same standard for evaluating retaliation claims in the context of student speech, finding "no reason to adopt a different standard." *Pinard*, 467 F.3d at 770 n.20.

[3] Under Section 1983, Plaintiff must demonstrate that each defendant *personally* participated in the deprivation of his rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

deter" the plaintiff from engaging in protected activity. 320 F.3d at 977.

Although Plaintiff makes broad claims that "Matteson, Moore, and Jones threatened Lopez with the speech code because they wanted to censor his religious speech," (Opp'n 3), most of the factual bases offered in support stem from Matteson's conduct. Matteson is not a moving Defendant on this Motion, and his default has already been entered. Other than the acts attributed to Matteson, the Complaint shows that any claim for alleged retaliation against the other two Defendants is based solely on a letter written by Jones to Plaintiff's legal representative. This letter is attached to, and quoted in, Plaintiff's Complaint.

Plaintiff claims that in response to Plaintiff's demand letter regarding Matteson's conduct, "Defendant Jones repeated two statements she allegedly received from other students who 'were deeply offended' by Lopez's 'hateful propaganda.' Jones even threatened punishment by repeating the complaint of one student who said, 'I don't know what kind of actions can be taken in this situation, but I expect that this student should have to pay some price for preaching hate in the classroom.' Any student receiving such a letter from a college administrator would naturally react by speaking less on campus, as Lopez has been forced to do." (*Id.* at 2). Plaintiff later refers to "Defendant Moore's and Jones' [*sic*] discriminatory and retaliatory accusations that his speech 'offended' others." (*Id.* at 4).

First, we note that Moore did not sign the letter written by Jones, and Plaintiff has made no allegation of any conduct by Moore other than to conclusorily include her name in conjunction with the allegations against Jones. (*See* Compl. ¶¶ 50-53, 58-59). Thus, we **GRANT** Moore's Motion to Dismiss for Plaintiff's failure to adequately allege Moore's personal involvement. For the same reason, to the extent that Plaintiff's retaliation claim is brought against "Defendants" generally, and thus subsumes Defendants Candaele, Field, Little, Mercer, Passman, Pearlman, Reddock, Santiago, and Scott-Hayes without alleging any retaliatory conduct on the part of these individuals, these Defendants' Motions to Dismiss are **GRANTED**.

Second, as to Jones, although her letter does recite two of the student complaints she had received concerning Plaintiff's in-class speech, the content of the letter cannot reasonably be characterized as threatening future punishment on the basis of such complaints. First, Jones attests to a commitment to disciplining Matteson, stating that a "progressive discipline process" is already underway, and describes the classroom incident as "extremely serious in nature." (Compl., Ex. 4). Second, after Jones relays the responses from some of the students in Plaintiff's speech class, she continues: "Where do we go from here? Regardless of the other students' reactions to Mr. Lopez' speech, Mr. Matteson will still be disciplined. First Amendment rights will not be violated[,] as is evidenced by the fact that even though many of the students were offended by Mr. Lopez' speech, no action will be taken against any of

them for expressing their opinions." (*Id.*). While this last comment by Jones may have been intended to needle Plaintiff's legal representative for what may be viewed as unreasonable demands, Jones's letter cannot reasonably be construed as a retaliatory action in response to Plaintiff's protected conduct.

Under Ninth Circuit case law, Jones's mere recitation of the student complaints aimed at Plaintiff is "so insignificant that it does not deter the exercise of First Amendment rights." *Coszalter*, 320 F.3d at 975. For instance, in *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998), the Ninth Circuit considered the retaliation claim brought by a plaintiff who had shown "that he was bad-mouthed and verbally threatened." *Id.* at 875. The plaintiff in *Nunez* was a police officer who had complained about the administration of an exam used for promotions; he alleged that his superiors retaliated by scolding him and threatening to transfer or dismiss him. *Id.* at 874. The court concluded that such actions, even if taken in response to protected speech, did not constitute the kind of retaliatory conduct that is actionable under the First Amendment. *Id.* at 875. The plaintiff had retained his job, and had not provided any evidence linking his failure to obtain a promotion to his criticisms. In view of the circumstances present in the case, the court observed that "[i]t would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation." *Id.*

In another case, the Ninth Circuit found that allegations of scolding and verbal threats made to a

state university employee, who planned to testify in an underlying lawsuit, were insufficient to establish a cognizable First Amendment retaliation claim. *See Bollinger v. Thawley*, 304 Fed. Appx. 612 (9th Cir. 2008). The plaintiff alleged that one of her supervisors yelled at her and wrote her a letter instructing her not to speak with the police, and another supervisor told a third party that he might take away the plaintiff's office space. *Id.* at 614. "Mere harsh words or threats" such as these, the court held, were "not reasonably likely to deter employees from engaging in protected activity." *Id.*

When read in context, it is clear that Jones did not include the students' complaints as proxy for her own opinion on the matter. If anything, her commentary on their statements tends to demonstrate the school's commitment to preserving a diversity of opinion by declining to punish students on either side of the debate. This represents a situation where it "would be the height of irony, indeed" if expression of disagreement—and a third party's disagreement, at that—formed the basis for a First Amendment violation.

Jones's closing remarks in the letter further preclude an interpretation of the letter as a threat. Plaintiff had previously asked Jones whether he should drop the speech class, and in response Jones "recommended that he stay in the class," and "also assured him that he would receive a fair grade for the speech in question, as well as a fair grade for the entire class." (Compl., Ex. 4). Jones had provided Plaintiff with her business card "and asked him to

stay in touch until after the matter of his grade is resolved." (*Id.*). Rather than threatening to punish Plaintiff for his exercise of speech rights, Jones appears dedicated to minimizing any effect that Matteson's behavior might have on Plaintiff's grade or classroom experience. At no point does Jones's letter refer to the school's sexual harassment policy, or the possibility that Plaintiff would be punished under its provisions as a result of his speech. In sum, Plaintiff cannot establish a First Amendment retaliation claim against Jones.

III. Freedom of Expression and Equal Protection

The viability of Plaintiff's equal protection claim is contingent upon a finding that Jones's letter impinged his First Amendment rights or treated him differently from similarly situated students based on his Christian faith. *See Center for Bio-Ethical Reform v. City and County of Honolulu*, 455 F.3d 910, 924 (9th Cir. 2006); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). However, Jones's letter cannot reasonably be construed as a veiled threat to suppress Plaintiff's speech based either on its content or Plaintiff's religious views. Thus, Plaintiff's claims for violations of his First and Fourteenth Amendment rights fail on this basis. For these reasons and those set forth in Part II, *supra*, Plaintiff's claims two and three are **DISMISSED** as to all moving Defendants.

IV. The Eleventh Amendment and Qualified Immunity

Plaintiff's fourth claim alleges that LACC's sexual harassment policy is overbroad and vague, and asserts claims against Defendants in their individual capacities for compensatory, nominal, and punitive damages. Plaintiff has also sued Defendants in their official capacities for declaratory and injunctive relief. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) ("A suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself."). As an initial matter, it should be noted that Plaintiff's challenge to the Policy does not implicate those Defendants who were not involved in promulgating or enforcing the Policy, since "[l]iability under section 1983 arises only upon a showing of personal participation by the defendant."[4] *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *see also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1036 n.2 (9th Cir. 1999) ("[P]laintiffs suing state officials in both their official and individual capacities must allege a connection

[4] Thus, Defendant Jones, who is not alleged to have had any role in crafting or enforcing the Policy at issue here, lacks the requisite causal connection and is not properly included in Plaintiff's fourth claim. In contrast, Defendants Candaele, Field, Little, Mercer, Moore, Passman, Pearlman, Reddock, Santiago, and Scott-Hayes are each alleged to have contributed to the development or enforcement of the sexual harassment Policy in their official capacities. (*See* Compl. ¶¶ 62, 68-70; Opp'n 23 ("By creating the speech code, the Defendants have failed to uphold their constitutional obligations.")).

between the state official and the allegedly unconstitutional action.").

A. Defendants in Their Official Capacities

Although the Eleventh Amendment insulates the Defendants in their official capacities from claims for money damages, the Amendment does not bar suit for prospective equitable relief. *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974); *see also Ex parte Young*, 209 U.S. 123 (1908).[5] We previously issued a preliminary injunction against enforcement of the Policy, finding it impermissibly overbroad on its face. As such, Defendants' Motion to Dismiss this claim is **DENIED** as to Defendants in their official capacities.

B. Defendants in Their Individual Capacities

Defendants contend that they are entitled to qualified immunity, which "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (citation

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[5] Community college districts are state entities entitled to Eleventh Amendment immunity, as are employees of community college districts sued in an official capacity. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988); *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 972 (9th Cir. 1994).

omitted). The Supreme Court has emphasized "the importance of resolving immunity questions at the earliest possible stage in litigation[,]" including "prior to discovery" or at the pleading stage by way of Rule 12(b)(6) motions to dismiss since qualified immunity "is an immunity from suit rather than a mere defense to liability" that "is effectively lost if a case is erroneously permitted to go to trial." *Id.*

The doctrine of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The standard applied is an objective one, and leaves "ample room for mistake in judgments," *id.* at 343, whether the mistake is one of law, one of fact, or a combination of the two. *See Pearson*, 129 S. Ct. at 815. For liability to attach, the "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right," meaning the right "must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Mueller v. Auker*, 576 F.3d 979, 992 (9th Cir. 2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

"The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury." *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004); *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (declining to define "the circumstances under which 'the state

of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court'"). In the Ninth Circuit, "in the absence of binding precedent, we 'look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts.'" *Boyd*, 374 F.3d at 781 (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003)).

However, the instances in which non-binding precedent may clearly establish a right for the purposes of qualified immunity are limited, such as when the "vastly overwhelming weight of authority on the precise question in [a] case held at the time" of a defendant's actions that such conduct was unconstitutional. *Inouye v. Kemna*, 504 F.3d 705, 715 (9th Cir. 2007) (acknowledging that the Ninth Circuit had not ruled on the question presented, but nonetheless finding that the defendant "had a wealth of on-point cases putting him, and any reasonable officer, on notice that his actions [coercing participation in a religious program] were unconstitutional"). In any event, "[t]he dispositive inquiry is 'whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted.'" *CarePartners, LLC v. Lashway*, 545 F.3d 867, 882 (9th Cir. 2008) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

We acknowledge that the Third Circuit's opinion in *DeJohn v. Temple University*, 537 F.3d

301 (3d Cir. 2008), is germane to the constitutional questions raised by the Policy's language. Indeed, since the Ninth Circuit has not directly addressed the instant situation, we drew upon the reasoning of *DeJohn* in preliminarily enjoining enforcement of the Policy. While *DeJohn*'s discussion is analytically rigorous and its ultimate decision is, in our view, correct, we cannot say that the "vastly overwhelming weight of authority" clearly dictated the result. *Inouye*, 504 F.3d at 715; *see also* Sept. 16, 2009 Order at 6 (merely stating, in response to Defendants' argument that the Ninth Circuit has upheld similar "*Hazelwood*-type regulation[s]" on student speech, that "the Ninth Circuit authority provided by Defendants is not inconsistent with *DeJohn*"). Our decision to preliminarily enjoin enforcement of the Policy expresses our belief that Plaintiff will likely prevail in challenging the Policy's overbreadth. However, whether the language is later held unconstitutional is not determinative in the instant qualified immunity analysis. Defendants' mistakes as to fact or law, even mistakes of constitutional magnitude, will not deprive them of protection under the doctrine unless it is sufficiently clear that a reasonable official would understand that the Policy's language violated the First Amendment rights of those subject to it. Our sentiments from our Order granting the preliminary injunction bear repeating: "We recognize the difficult task Defendants faced in sculpting the Policy. We further recognize that Defendants have, laudably, attempted to prevent sexual harassment on the District's campuses." (July 10, 2009 Order at 1). Moreover, *DeJohn* was decided on August 4, 2008—

just narrowly preceding the events of the academic fall semester that formed the basis of Plaintiff's first three claims. (*See* Compl. ¶¶ 45-55). While we are not aware of the precise date on which Defendants promulgated the District's sexual harassment policy, we are nonetheless comfortable in assuming that it was in place before Defendants could have benefitted from *DeJohn*'s guidance.

Here, the available precedents that might have guided the Defendants in crafting a sexual harassment policy leave the unlawfulness of the language, in a college setting, at least unclear within the qualified immunity inquiry. As Defendants have consistently stressed to the Court in defending the constitutionality of the Policy, the language that we enjoined has been used by the Equal Employment Opportunity Commission, and appears in 29 C.F.R. § 1604.11(a) and California Education Code § 212.5. Likewise, although the fact that the Policy's language has been judicially approved in other contexts does not determine the propriety of its use in a college setting, it does arguably lend a general imprimatur to the language that could be mistakenly relied upon by the school administrators in this case.

In an analogous situation, the Ninth Circuit held qualified immunity available to college administrators for disciplining a tenured professor for violating a sexual harassment policy that violated the First Amendment on an as-applied basis. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 973 (9th Cir. 1996). The *Cohen* court reasoned that "[n]either the Supreme Court nor this

Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech." *Id.* at 971. The college officials who disciplined the professor were thus entitled to qualified immunity, the court determined, since "[t]he legal issues raised in this case are not readily discernable and the appropriate conclusion to each is not so clear that the officials should have known that their actions violated [the professor's] rights." *Id.* at 973. As in *Cohen*, pre-existing case law did not clearly alert Defendants to the violation of First Amendment rights that would result from using the same sexual harassment policy language that has been statutorily and judicially approved in the employment context. Defendants are therefore entitled to qualified immunity under 42 U.S.C. § 1983, and are not liable for money damages in their individual capacities for any constitutional violations under Plaintiff's fourth claim.

V. Conclusion

Defendants' Motion for Dismissal is **GRANTED in part**; claims one, two, and three are **DISMISSED** as to all moving Defendants. Plaintiff has not previously amended his original Complaint, and the liberal amendment standard of Rule 15 militates in favor of providing Plaintiff the opportunity to allege additional facts sufficient to support these claims. We have thoroughly reviewed the contents of the letter which forms the sole basis for these claims against the moving Defendants, and are skeptical as to whether these claims could be

saved by amendment consistent with Rule 11.[6] Counsel is cautioned that failure to abide by his Rule 11 obligations will subject him to an appropriate sanction. If Plaintiff wishes to file an amended complaint as to claims one, two, or three, he **SHALL** do so **within twenty-one (21) days** hereof. Failure to timely file an amendment as to these claims will result in their dismissal against the moving Defendants with prejudice.

Claim four, insofar as it alleges a claim for money damages against Defendants in their individual capacities, is barred by the Defendants' qualified immunity and is thus **DISMISSED with prejudice** without leave to amend. The Motion is **DENIED** on claim four as to Defendants Candaele, Field, Little, Mercer, Moore, Passman, Pearlman, Reddock, Santiago, and Scott-Hayes ("Administrative Defendants") in their official capacities. Should Plaintiff decline to file an amended Complaint in compliance with this Order, the Administrative Defendants **SHALL** answer the fourth claim in their official capacities **within ten (10) days** thereafter.

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[6] Federal Rule of Civil Procedure 11, in relevant part, requires that to the best of counsel's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," any such "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3).

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk Bea

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. CV 09-0995-GHK (FFMx)
Date September 16, 2009
Title *Jonathan Lopez, et al. v. Kelly G. Candaele, et al.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: (In Chambers) Order re: Defendants' Motion for Reconsideration of Ruling on Preliminary Injunction [52]

This matter is before the Court on Defendants Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, Sylvia Scott-Hayes, Gene Little, Jamillah Moore, Allison Jones, and Cristy Passman's (collectively "Defendants"[1]) Motion for

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[1] The Motion names Nancy Santiago rather than Miguel Santiago, and omits Angela J. Reddock. (Motion 2:2–7). We assume this was done in error.

Reconsideration of Ruling on Preliminary Injunction ("Motion").

I. Appropriateness of the Motion

Under Local Rule 7-18, a motion for reconsideration may be brought only on the grounds of:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Here, Defendants cannot satisfy any of the above grounds. The Motion does not raise any changed law or facts. Rather, the Motion brings new arguments previously available though not raised, and rehashes previous arguments using additional authority. Defendants do not get a mulligan simply because they chose to retain new counsel.

Accordingly, we would be justified in denying the Motion on this basis alone. Nevertheless, we exercise our discretion to entertain the merits.

II. Merits of the Motion

Defendants raise three arguments through this Motion: (1) the language enjoined by our Order has been legislatively and judicially approved; (2) the language is not overbroad; and (3) we relied too much on *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) in our previous ruling.

A. Legislative and Judicial Approval

Defendants point out that the language we enjoined has been used by the Equal Employment Opportunity Commission. We are amused that Defendants believe their Motion draws this to our attention for the first time, since this fact appears in many of the relevant cases, including *DeJohn*, 537 F.3d at 320 n.21, upon which Defendants believe we "relied too much." (Motion 11). The language also appears in 29 C.F.R. § 1604.11(a) and California Education Code § 212.5. Defendants cite no authority for the dubious proposition that an otherwise unconstitutional policy at a public college becomes constitutional merely because similar language appears in other statutes and regulations.

Defendants next assert that the language has been judicially approved many times. However, Defendants' cases are easily distinguishable. Most are Title VII employment cases: *Meritor Sav. Bank,*

FSB v. Vinson, 477 U.S. 57 (1986); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Jordan v. Clark*, 847 F.2d 1368 (9th Cir. 1988); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590 (1989). In the employment context, even a government employer may restrict speech that may affect its operations. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("A government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations."). By contrast, college students possess broader First Amendment rights. As we stated in our Order:

> Supreme Court precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation marks omitted).

(Docket # 49 at 3). That regulations that might be permissible in the employment context does not necessarily dictate a like result in the college setting.

Moreover, none of Defendants' cases listed above involves a constitutional challenge to the

relevant language, and most do not mention the First Amendment. The only case that mentions the First Amendment does so in an entirely inapposite way. *See Venters*, 123 F.3d at 961 ("Venters sued the city and its Police Chief Larry Ives on the grounds that the discharge violated her rights to freedom of speech, religion, and association under the First Amendment . . . .").

Thus, Defendants' authorities do not support their position.

Defendants also offer several school cases, but again none of these cases conflicts with our Order. Defendants cite *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), for the proposition that sexual harassment may be actionable in a school under Title IX. They also cite *Oona by Kate S. v. McCaffrey*, 143 F.3d 473 (9th Cir. 1998), for the proposition that school officials have a duty to remedy known sexual harassment similar to the duty of an employer. These propositions are as uncontroversial as they are inapposite here. The question is not whether sexual harassment can be prohibited. Nor is the question whether school officials have a duty to remedy known sexual harassment. Rather, the question presented in our case is whether Defendants' selected policy to combat sexual harassment is constitutional. Tellingly, neither *Franklin* nor *Gebser* discusses the contested language and all three of these cases do not involve a constitutional challenge or the First Amendment.

Defendants offer three cases that applied the contested language: *Hayut v. State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003); *Granowitz v. Redlands Unified Sch. Dist.*, 105 Cal. App. 4th 349 (2003); and *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N.D. Cal. 1993). However, none of these cases involves a constitutional challenge to the language. Moreover, *Hayut* is the only one of these cases to discuss the First Amendment, and its statements, though dicta, tend to support Plaintiff:

> Professor Young articulates no defenses for his conduct and, specifically, has never expressly asserted that the comments complemented his classroom curriculum or had any other legitimate pedagogical purpose that might merit the kind of First Amendment protection that has long been recognized in the academic arena. *See, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967) ("[Academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). We, therefore, express no view on (a) whether such a defense could have been, or

> could still be, made, or (b) if made, whether this claim would entail issues of fact or law.

352 F.3d at 745. Thus, Defendants have not offered any school cases that conflict with our Order. Moreover, the only case from the Ninth Circuit to address a constitutional challenge to the contested language in a college setting, *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), found the language unconstitutional, though that holding was as-applied and on vagueness grounds.

Therefore, contrary to Defendants' assertion, none of their cases stands for the proposition that the contested language has been judicially approved in the context of the issues we faced and decided in our Order.

B. Overbreadth

Defendants argue that in *Freitag v. Ayers*, 468 F.3d 528, 542 (9th Cir. 2006), the court adopted the plaintiff's statement that 29 C.F.R. 1604.11 is "clear language." *Freitag* is not helpful to Defendants. The court's statement was made in response to the defendants' argument that they could not be liable for retaliation because an employer cannot engage in retaliation if the employer does not know the employee is opposing a violation of Title VII. *Id.* The court stated that the defendants' inability to understand Title VII, particularly in light of the clear language of 29 C.F.R. 1604.11, did not allow the defendants to retaliate against the plaintiff.

Thus, *Freitag* did not involve a challenge to the language. Moreover, we enjoined the Policy for overbreadth—not for vagueness—and *Freitag*'s statement that the language is "clear" does not undermine the basis for our Order. Even if we were considering vagueness, the Ninth Circuit has found the language unconstitutionally vague in the school context. *See Cohen*, 92 F.3d at 972 (involving an as-applied challenge).

Defendants state, "In *Granowitz v. Redlands Unified School Dist.*, [105 Cal. App. 4th 349 (2003)], the California Court of Appeal had no difficulty applying the language of Education Code Section 212.5 to physical and verbal harassment by a student to another student, and finding that it survived a challenge under the due process clause." (Motion 7–8). Defendants grossly mischaracterize *Granowitz*. The due process challenge was directed at whether the plaintiff received a sufficient hearing before his suspension was imposed, not at the constitutionality of the Education Code. *See Granowitz*, 105 Cal. App. 4th at 354 ("we emphasize that we are deciding only whether plaintiff was suspended in accordance with the limited requirements of due process under the circumstances of this case").

Defendants further argue that the language of the Policy does not prohibit protected speech, as it regulates only "conduct having a discernible effect," and does not target expression "on the basis of content." (Motion 9-10). Defendants are wrong in at least two respects. First, this assertion is belied by

the language of the Policy, which specifically reaches verbal as well as visual or physical conduct. (Comp., Ex. 7 at 41). Moreover, verbal "conduct" constituting sexual harassment is explained on the Los Angeles City College's own website to include "generalized sexist statements, . . . insulting remarks; intrusive comments about physical appearance; . . . [or] humor about sex." (*Id.*, Ex. 11 at 150- 51). Thus, the Policy undeniably targets the content of expression. Second, the Policy unmistakably regulates more than simply "conduct having a discernible effect." It proscribes speech that is merely uttered with the *purpose* of having a negative impact, notwithstanding the lack of any actual effect, on the listener. Even if speech has a negative effect on or is otherwise offensive to the listener, that in and of itself is insufficient to justify its prohibition. "Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Cohen v. California*, 403 U.S. 15, 25 (1971). Thus, the First Amendment affords protection to "verbal tumult, discord, and even offensive utterance"; "so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

Defendants quote the Supreme Court's statement in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that "since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a

proscribable class of speech can be swept up incidently within the reach of a statute directed at conduct rather than speech." *Id.* at 389 (citing *Barnes v. Glen Theatre*, 501 U.S. 560, 571 (1991)). This reliance on *R.A.V.* misconstrues the context and meaning of the Court's discussion and mistakes its relevance to this case. In context, the Court was attempting to distinguish between instances where content-based regulation of a subcategory of otherwise proscribable speech is unconstitutional (as in the St. Paul ordinance at issue) from those where "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *Id.* at 389. The issue before us is whether the Policy, in including expression within the scope of its regulation, unduly reaches a substantial amount of otherwise protected speech. It is no response to assert that a law may regulate a content-based subclass of unprotected speech that is swept up incidentally within the reach of a law targeting conduct rather than speech. Indeed, the Court went on to observe that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 390. Here, the Policy is undeniably aimed at the content of the expression by prohibiting speech involving certain content, *i.e.*, sexist comments, insulting remarks or intrusive comments about one's gender. (*See* Compl., Ex. 11 at 150-51).

Defendants also cite the Court's comment that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. § 2000e-2; 29 CFR § 1604.11 (1991)." *R.A.V.*, 505 U.S. at 389. They argue that "[t]he *[R.A.V.]* Court singled out a time-tested definition of sexual harassment as an example of a valid proscription of 'sexually derogatory fighting words.'" (Motion 10). If this argument means that fighting words can be within the cited CFR definition of sexual harassment, it is both correct and irrelevant. Our conclusion is not that the Policy has no valid application. Rather we held that it was unconstitutionally overbroad by sweeping within its reach a substantial amount of protected speech. If, on the other hand, Defendants mean that all speech that offends this definition is necessarily proscribable as sexually derogatory fighting words, then we reject this argument as an unwarranted and unconstitutional enlargement of what constitutes fighting words.[2]

Finally, Defendants argue that rather than enjoining the Policy, we should have narrowed it. However, as in the original briefing, Defendants are unable to offer any useful suggestions for narrowing. The Motion does not make any suggestions, other

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[2] We also do not view the Court's passing citation to 29 CFR § 1604.11 as its endorsement of this regulation in every context and instance, especially where the Court had no occasion to determine whether that regulation passes constitutional muster in the context of speech in a public area on a public college campus.

than to read the language in the context of the remainder of the Policy. (Motion 11). We considered the Policy as a whole before enjoining the language. (Docket # 49 at 8). The Reply asks us to "exclude from [the Policy's] scope communications that are protected speech. Indeed, the Court's own language could potentially serve as a starting point: the Policy might be construed not to apply to student discussions of 'religion, homosexual relations and marriage, sexual morality and freedom, polygamy, or . . . gender politics and policies,' among other things." (Reply 11 (ellipsis in original)). We do not see how we could do so without impermissibly rewriting the Policy. *See Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996).

Thus, we again reject Defendants' argument that the Policy is not overbroad.

3. ***DeJohn***

Defendants argue that we relied too heavily on *DeJohn* for three reasons. First, Defendants point out that the language of the policy at issue in *DeJohn* and the instant Policy are slightly different. We were aware of those differences when we issued our Order, and we concluded that those differences did not warrant a different result. (Docket # 49 at 6 n.4).

Second, Defendants argue that *DeJohn* is inconsistent with Ninth Circuit opinions. Defendants argue that because the Ninth Circuit concluded in *Cohen*, 92 F.3d 968, that similar language was

unconstitutional as applied, the court was signaling that the language is not facially unconstitutional. (Motion 8–9, 13). Although *Cohen* briefly mentions overbreadth, it was decided on vagueness grounds. 92 F.3d at 972. Thus, *Cohen* does not directly address the instant situation. More importantly, we do not believe that *Cohen* sent a signal that the disputed language is not facially overbroad. Defendants also argue that the Ninth Circuit has upheld "*Hazelwood*-type regulation[s]" on student speech, and thus the Ninth Circuit likely would not find the Policy unconstitutional. (Motion 13–14). As we stated in our Order, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) is inapplicable here. (Docket # 49 at 5 n.3). Thus, the Ninth Circuit authority provided by Defendants is not inconsistent with *DeJohn*.

Finally, Defendants criticize *DeJohn* as a singular case and not well reasoned. (Motion 14). We think that *DeJohn* is well reasoned. Moreover, Defendants are unable to cite any case where a similar policy survived a constitutional challenge in a college setting so that it might arguably be said to conflict with *DeJohn*. To the contrary, the Third Circuit has rejected a substantially similar policy even in an elementary and high school setting. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 216–17 (3d Cir. 2001). Thus, Defendants' scattershot and disjointed arguments do not defeat the reasoning of *DeJohn*.

III. Conclusion

Defendants have shown no valid reason for disturbing our previous Order. Accordingly, Defendants' Motion for Reconsideration is **DENIED**.

IT IS SO ORDERED.

Initials of Deputy Clerk Bea

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. CV 09-0995-GHK (FFMx)
Date July 10, 2009
Title *Jonathan Lopez, et al. v. Kelly G. Candaele, et al.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: (In Chambers) Order re: Plaintiff's Motion for Preliminary Injunction

This matter is before the Court on Plaintiff Jonathan Lopez's ("Plaintiff") Motion for Preliminary Injunction ("Motion"). We have considered the papers filed in support of and opposition to this Motion, as well as counsel's oral arguments on June 10, 2009. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

Plaintiff alleges that the Los Angeles Community College District's ("District") Sexual Harassment Policy ("Policy"), in use at Los Angeles

City College ("LACC"), is unconstitutionally overbroad and vague, both facially and as applied. (Comp., 24–25.) On these grounds, Plaintiff moves for a preliminary injunction enjoining Defendants from enforcing the Policy.

Defendants Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, Sylvia Scott-Hayes, Gene Little, Jamillah Moore, Allison Jones, and Cristy Passman (collectively "Defendants") argue that the Policy is constitutional and prevents harassment on the District's campuses. We recognize the difficult task Defendants faced in sculpting the Policy. We further recognize that Defendants have, laudably, attempted to prevent sexual harassment on the District's campuses. Nevertheless, because the Policy regulates expression as well as conduct, we must ensure that it complies with the First Amendment. *See Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 971 (9th Cir. 1996).

I. Jurisdiction

Our jurisdictional inquiry requires us to examine standing, mootness, and ripeness. *See DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006). "To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))

(internal quotation marks omitted). A plaintiff need not wait for actual prosecution under a statute to have standing to challenging it, but rather only "must allege that [he has] been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible." *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999) (citing *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 299 (1979)) (internal quotation marks omitted). "Moreover, in recognition that the First Amendment needs breathing space, the Supreme Court has relaxed the prudential requirements of standing in the First Amendment context." *Canatella v. California*, 304 F.3d 843, 853 (9th Cir. 2002) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 956 (1984)) (internal quotation marks omitted). Thus, a plaintiff has standing to challenge a law if it chills his First Amendment rights. *Culinary Workers*, 200 F.3d at 618–19. However, the plaintiff must show that the law at least arguably reaches speech in which he wishes to engage. *See Arizonans for Official English*, 510 U.S. at 64 ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."); *Canatella*, 304 F.3d at 854 n.14 ("[W]e do not imply that the mere existence of the challenged provisions gives rise to an injury sufficient for standing purposes.").

Here, Plaintiff has standing to maintain the facial overbreadth challenge. As a student at LACC, he is subject to the Policy. Plaintiff's interest in the Policy is more than a general interest shared with

the student body at large. He alleges that he is a Christian who is duty-bound to share his religious beliefs with other students. (Comp. ¶ 25 26.) However, he refrains from doing so for fear of punishment under the Policy. (*Id.* ¶¶ 58, 95.) As discussed below, Plaintiff has shown that the Policy likely reaches such speech. Thus, Plaintiff has standing to bring a facial challenge.[1]

Defendants contend that Plaintiff's case is moot and not ripe. This case stems from a presentation Plaintiff made in a speech class, where he spoke about his religion-based opposition to same-sex marriage. (Comp., 8–9.) Plaintiff's professor allegedly called Plaintiff a "fascist bastard," cut his speech short, and refused to give Plaintiff a grade. *Id.* Defendants argue that this case is moot because Plaintiff received an "A" in the speech class, he remains enrolled at LACC, and the professor has been disciplined. (Reply to Mot. for Dismissal, 2, Opp'n to Prelim. Inj., 9–10.)

Defendants' argument misses the mark because Plaintiff is also attacking the facial validity of the Policy, not merely the incident with the professor. Until Plaintiff is no longer a student at LACC, he is subject to the Policy, and therefore his facial challenge to the Policy is not moot. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 311–13 (3d Cir. 2008). This case is likewise not mooted by Defendants' recent revelation that the Policy was supposedly

[1] Because we conclude that Plaintiff has standing to bring a facial challenge, we need not reach Plaintiff's standing to bring an as applied challenge.

repealed in 2007.[2] (*See* Order re: App. to Supp. Evid., June 19.) First, the Policy continues to appear on the District's and LACC's websites. (Lopez Decl. in Opp. to App. to Supp. Rec.) Thus, Plaintiff, and other students and employees, can reasonably believe they are subject to the Policy and experience a chilling effect. Moreover, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., does not make the case moot." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). This is especially true where, as here, a school continues to defend the constitutionality and need for that policy even after it was supposedly changed, because the school can reinstate the policy at any time, absent an injunction. *See DeJohn*, 537 F.3d at 309–10. Thus, Plaintiff's facial challenge to the Policy is not moot.

"Ripeness is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation marks and citations omitted). In analyzing ripeness, a court considers (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Id.* at 581. Defendants concede that

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[2] We are chagrined that defense counsel and Defendants' representative who were present at the oral argument on June 10, 2009 were apparently ignorant of the status of a policy they purported to defend. This lack of preparedness is viewed with great disfavor.

the issues are fit for judicial review because the questions are primarily legal in nature and no further factual development is needed. (Opp'n to Prelim. Inj., 12.) However, Defendants argue this case is not ripe because Plaintiff would not suffer a hardship if we declined to hear this facial challenge because he cannot allege that he faces a realistic threat from the Policy. *Id.*

We conclude that this case is ripe. No further factual development is required, as Defendants concede. Contrary to Defendants' contention, Plaintiff faces a hardship if we decline to entertain the challenge to the Policy, because Plaintiff's speech is chilled. Moreover, courts presented with similar cases have not dismissed for lack of ripeness. *See, e.g., DeJohn*, 537 F.3d 301; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). Thus, we conclude the case is ripe.

Because Plaintiff has standing to maintain a facial overbreadth challenge, the challenge is not moot, and the challenge is ripe, we have jurisdiction.

II. Overbreadth

Supreme Court precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169,

180 (1972) (internal quotation marks omitted). Nevertheless, Defendants argue that the overbreadth doctrine should not be applied in this case because the doctrine has never been applied by the Ninth Circuit in a student free speech case. (Opp'n to Prelim. Inj., 13–14). However, Defendants have not cited any case, much less one from the Ninth Circuit or the Supreme Court, that has precluded application of the overbreadth doctrine in an appropriate student speech case. Moreover, district courts from within the Ninth Circuit have applied the overbreadth doctrine to student speech cases. *See, e.g., Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1012 (N.D. Cal. 2007); *Kyriacou v. Peralta Cmty. Coll. Dist.*, No. 08-4630, 2009 U.S. Dist. LEXIS 32464 (N.D. Cal. Mar. 31, 2009). Furthermore, the Ninth Circuit has applied the overbreadth doctrine to a sexual harassment policy at a community college, though the case related to the speech of a professor rather than a student. *Cohen*, 92 F.3d at 971–72. Finally, other jurisdictions have applied the overbreadth doctrine to student speech cases. *See, e.g., DeJohn*, 537 F.3d at 313; *Saxe*, 240 F.3d at 214; *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989); *Booher v. Bd. of Regents*, No. 96-135, 1998 U.S. Dist. LEXIS 11404, at *21 (E.D. Ky. July 21, 1998). Thus, we conclude the overbreadth doctrine is applicable here.

Laws regulating speech must be narrowly tailored because "'First Amendment freedoms need breathing space to survive.'" *Cohen*, 92 F.3d at 972 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Protected speech may include offensive

speech because "'[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, . . .'" *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't*, 533 F.3d 780, 787–88 (9th Cir. 2008) (quoting *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970)).

In a facial overbreadth challenge, "[t]he showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (internal quotation marks and citations omitted). "[A] law's application to protected speech [must] be substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the strong medicine of overbreadth invalidation." *Id.* at 119-20 (internal quotation marks omitted).

The definitions section of the Policy, Section 15003, states:

> Sexual harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature, made by someone from or in the workplace or in the

> educational setting, under any of the following conditions: . . (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment. . .

(Comp., Ex. 7 at 41.) Two websites, one maintained by the District and the other by LACC, purport to expound upon the Policy. The District's website states that sexual harassment can include "[d]isparaging sexual remarks about your gender[, r]epeated sexist jokes, dirty jokes or sexual slurs about your clothing, body, or sexual activities[, and d]isplay of sexually suggestive objects, pictures, cartoons, posters, screen savers[.]" (*Id.*, Ex. 10 at 146.) Moreover, the site states, "If [you are] unsure if certain comments or behavior are offensive do not do it, do not say it. . . . Ask if something you do or say is being perceived as offensive or unwelcome. If the answer is yes, stop the behavior." (*Id.* at 147.) LACC's website states that "[s]exual harassment can be intentional or unintentional." The website further states:

> It is important to be aware that sexual remarks or physical conduct of a sexual nature may be offensive or can make some people uncomfortable even if you wouldn't feel the same way yourself. It is therefore sometimes difficult to know what type of behavior is sexual harassment. However the defining characteristic of sexual harassment is

> that it is unwanted and pervasive. It's important to clearly let an offender know that certain actions are unwelcome. The four most common types of sexual harassment are:
>
> 1. Sexual Harassment based on your gender: This is generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex.
>
> . . . .

(*Id.*, Ex. 11 at 150–51.)

We conclude that the Policy prohibits a substantial amount of protected free speech, even judged in relation to unprotected conduct that it can validly prohibit. First, as the above quotations make clear, the Policy prohibits some speech solely because the speaker "has the purpose" of causing an effect, regardless of whether the speech actually has any effect. The Supreme Court has held that a school may not prohibit speech unless the speech will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting

Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).[3] Other circuits have found similar sexual harassment policies that restrict speech based on the speaker's motives to be unconstitutional in light of *Tinker*. *See DeJohn*, 537 F.3d at 317 ("[T]he focus on motive is contrary to *Tinker*'s requirement that speech cannot be prohibited in the absence of a tenable threat of disruption."); *Saxe*, 240 F.3d at 216–17 ("As an initial matter, the Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the purpose or effect of' interfering with educational performance or creating a hostile environment. This ignores *Tinker*'s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it."). Notably, in *Saxe*, a similar policy was found unconstitutional though it was adopted by an elementary and high school district, whose students receive less First Amendment protection than college students. *Compare Healy v. James*, 408 U.S. 169, 180 (1972) *with Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682–83 (1986). Thus, the Policy's regulation of speech based solely on the motive of the speaker is unconstitutional.

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[3] There are certain categories of speech, inapplicable here, that are excepted from the *Tinker* standard. *See, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a high school may ban from classrooms and assemblies "vulgar and lewd speech [that] would undermine the school's basic educational mission."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that a high school may control the content of student speech in school-sponsored expressive activities so long as the controls are reasonably related to legitimate pedagogical concerns).

Moreover, by using subjective words such as "hostile" and "offensive," the Policy is so subjective and broad that it applies to protected speech. In *DeJohn*, the Third Circuit concluded that such a policy must be invalidated unless it contains "a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work." 537 F.3d at 318 (citing *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999)). Here, the Policy does not contain both a subjective and objective requirement. To the contrary, the District's website admonishes, "If [you are] unsure if certain comments or behavior are offensive do not do it, do not say it. . . . Ask if something you do or say is being perceived as offensive or unwelcome." (Comp., Ex. 10 at 147.) Thus, the Policy reaches constitutionally protected speech that is merely offensive to some listeners, such as discussions of religion, homosexual relations and marriage, sexual morality and freedom, polygamy, or even gender politics and policies. Indeed, the LACC's website indicates that sexual harassment can include "sexist statements . . . or degrading attitudes/comments about women or men." (*Id.*, Ex. 11 at 151.) This could include an individual's outdated, though protected, opinions on the proper role of the genders. While it may be desirable to promote harmony and civility, these values cannot be enforced at the expense of protected speech under the First Amendment.

Thus, the Policy is unconstitutionally overbroad.

II. Narrowing

Before striking down a law as facially unconstitutional, a court must consider any narrowing construction that could render the law consistent with the First Amendment. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982). "Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. . . . In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe [the District] would not have rejected." *Ma v. Ashcroft*, 257 F.3d 1095, 1111 (9th Cir. 2001) (quoting *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1295 n. 6 (9th Cir. 1992) (Kozinski, J., dissenting), *rev'd* 513 U.S. 64 (1994). Therefore, we may sever portions of the Policy if doing so renders the remaining portions constitutional, unless it is evident that the District would not have enacted the remaining portions of the Policy. *Regan v. Time, Inc.*, 468 U.S. 641, 652–53 (1984). However, we may not "rewrite" the Policy to cure constitutional problems. *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996).

Here, we could excise the word "purpose" from the Policy so that it reads: "(3) The conduct has the effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment. . . ." However, that does not cure the constitutional infirmities. A "negative

impact" upon the work or academic performance of another does not necessarily justify restricting First Amendment freedoms. Rather, under *Tinker*, student speech must "collide with the rights of others" to be proscribed, even when the topic of the speech is controversial subjects. 393 U.S. at 511 (1969). Speech that has a "negative impact" does not necessarily collide with the rights of others, and cannot be broadly proscribed.

Indeed, the *DeJohn* court came to the same conclusion when attempting to narrow a very similar policy.[4] The court stated:

> Even if we ignore the "purpose" component, the Policy's prong that deals with conduct that "unreasonably interfere[s] with an individual's work" probably falls short of satisfying the *Tinker* standard. If we were to construe "unreasonable" as encompassing a subjective and objective component, it still does not necessarily follow that speech which effects an unreasonable interference with an individual's work justifies restricting another's First Amendment freedoms. Under

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[4] The policy at issue in *Dejohn* stated: "[A]ll forms of sexual harassment are prohibited, including the following: an unwelcome sexual advance, request for sexual favors, or other expressive, visual or physical conduct of a sexual or gender-motivated nature when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment."
537 F.3d at 305.

> *Tinker*, students may express their opinions, even on controversial subjects, so long as they do so "without colliding with the rights of others." *Tinker*, 393 U.S. at 512. As we observed in *Saxe*, while the precise scope of this language is unclear, *Saxe*, 240 F.3d at 217, we do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech.

Id. at 319–20.

This analysis is equally applicable to the instant case. Although the instant Policy replaces the language in *DeJohn* ("conduct has the purpose or effect of unreasonably interfering with an individual's work . . .") with the language "conduct has the purpose or effect of having a negative impact upon the individual's work . . ," we do not believe this change is a material improvement. The change does not address the concerns expressed by the *DeJohn* court that core protected speech is suppressed even if that speech does not collide with the rights of others.

Moreover, the Policy's prohibition of speech that "creat[es] an intimidating, hostile or offensive work or educational environment" sweeps within it significant protected speech. For example, Plaintiff's protected speech in his speech class was offensive to some of his classmates (Comp., Ex. 4 at 35–36) and

thus could be prohibited by the Policy. The *DeJohn* court concluded almost identical language could not be narrowed. 537 F.3d at 320 ("It is difficult to cabin this phrase, which could encompass any speech that might simply be offensive to a listener, or a group of listeners, believing that they are being subjected to or surrounded by hostility.").

Since we conclude that the Policy cannot be saved by excising words from Section 15003(A)(3), we must consider whether all of Section 15003(A)(3) can be severed from the Policy. Section 15003(A) is strangely drafted in that the conduct is referred to throughout Section 15003(A), though it is defined in Section 15003(A)(3). Therefore, removing Section 15003(A)(3) would leave "conduct" with no definition in the remainder of Section 15003(A). Section 15003(A) states:

> A. Sexual harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and *other verbal, visual or physical conduct* of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions:
>
> 1. Submission to *the conduct* is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.
> 2. Submission to, or rejection of, *the conduct* is used as the basis for

employment or academic decisions affecting the individual.

3. *The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.*

4. Submission to, or rejection of, *the conduct* by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the District.

5. Retaliation against anyone who makes a complaint, refers a matter for investigation or complaint, participates in investigation of a complaint, represents or serves as an advocate for an alleged victim or alleged offender, or otherwise furthers the principles of this policy.

(Comp., Ex. 7 at 41 (emphasis added).) Thus, Section 15003(A)(3) cannot be severed from the Policy.

Therefore, the Policy cannot be rendered constitutional by excising words or severing sections.

The Policy does contain a paragraph that somewhat limits its reach. However it is not sufficient to render the Policy constitutional. That paragraph states:

> The Board of Trustees reaffirms its commitment to academic freedom, but recognizes that academic freedom does not allow sexual harassment. The discussion of sexual ideas, taboos, behavior or language which is an intrinsic part of the course content shall in no event constitute sexual harassment. It is recognized that an essential function of education is a probing of received opinions and an exploration of ideas which may cause some students discomfort. It is further recognized that academic freedom insures the faculty's right to teach and the student's right to learn.

(Comp., Ex. 7 at 40–41.) Even when the Policy is considered in light of this paragraph, the Policy reaches speech unrelated to a class, such as discussions in any public and common areas at LACC. Even speech related to a class can be restricted by the Policy if the speech is not an intrinsic part of the course content. Thus, the Policy is not sufficiently narrowed by this paragraph.

Defendants' only suggestion for narrowing the Policy is, inexplicably, to give the Policy its plain meaning. (Opp'n to Prelim. Inj., 16; *see also* Mot. for Dismissal, 11.) However, the plain meaning of the statute creates the problems listed above. Likewise,

Defendants were unable to suggest any useful method of narrowing at the hearing.

Therefore, we conclude that the Policy is not susceptible to a narrowing construction.

IV. Injunctive Relief

To obtain a preliminary injunction, Plaintiff must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm absent an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374 (2008).

Here, the elements are satisfied. Plaintiff is likely to succeed on the merits, for the reasons discussed above. He, and other individuals subject to the Policy, face irreparable injury because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The balance of hardships favors granting the injunction because Plaintiff and other individuals subject to the Policy face the deprivation of their constitutional liberties, whereas Defendants are merely enjoined from enforcing the likely unconstitutionally overbroad Policy. Finally, the public interest favors the injunction because there is a significant public interest in upholding First Amendment rights. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002). We recognize that the public also has an interest in prohibiting

sexual harassment on the District's campuses. However, a properly-drafted statute could achieve that end without running afoul of the First Amendment.

V. Security

Where, as here, the party seeking a preliminary injunction is not the United States or its officers or agents, a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). However, because a court has discretion as to the amount of security required, a court can waive the security requirement. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). Valid concerns in setting the security include the cost to the defendant if later found to have been wrongfully enjoined, the public interest underlying the litigation, and the unremarkable financial means of the plaintiff. *Id.*

Here, Defendants face little cost if wrongfully enjoined. The public interest favors a waiver of security because, as described above, the public has a significant interest in upholding First Amendment rights. Finally, Plaintiff, a college student, has limited financial means.

Therefore, we waive the security requirement for this preliminary injunction.

VI. Preliminary Injunction

Plaintiff's Motion for Preliminary Injunction is **GRANTED**. Defendants, their officers, agents, servants, employees, and attorneys, and other persons who are in active participation with such people, who receive actual notice by personal service or otherwise, are hereby **ENJOINED** from enforcing or publicizing the purported existence of the Policy during the pendency of these proceedings. In aid of this injunction, the Policy, along with any partial quotation, paraphrase, explanation, or other reference to the Policy that violates this Order, **SHALL** be removed from the District's and LACC's websites, including but not limited to the webpages referenced in exhibits 10 and 11 to the Complaint. Within **fourteen (14) days** hereof, Defendants **SHALL** submit a declaration under penalty of perjury from an individual with personal knowledge attesting that such references have been removed from the websites. The declarant **SHALL** specify the actions taken to comply with this Order.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____ Bea _____

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONATHAN LOPEZ, Plaintiff-Appellee, vs. KELLY G. CANDAELE, in his individual and official capacities as member of the Los Angeles Community College District Board of Trustees; MONA FIELD, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; GEORGIA L. MERCER, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; NANCY PEARLMAN, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; ANGELA J. REDDOCK, in her individual and official capacities as member of the Los Angeles	No. 09-56238 D.C. No. 2:09-cv-00995-GHK-FFM ORDER

Community College District Board of Trustees; MIGUEL SANTIAGO, in his individual and official capacities as member of the Los Angeles Community College District Board of Trustees; SYLVIA SCOTT-HAYES, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; GENE# LITTLE, in his individual and official capacities as Director of the Los Angeles Community College District Office of Diversity Programs; JAMILLAH MOORE, in her individual and official capacities as President of Los Angeles City College; ALLISON JONES, in her individual and official capacities as Dean of Academic Affairs at Los Angeles City College; CRISTY PASSMAN, in her individual and official capacities as Compliance Officer at Los Angeles City College,

Defendants-Appellants.

and

JOHN MATTESON, in his individual and official capacities as Professor of Speech at Los Angeles City College,
Defendant.

Before: GOULD, IKUTA and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONATHAN LOPEZ,

Plaintiff-Appellee,

v.

KELLY G. CANDAELE, in their individual and official capacities as members of the Los Angeles Community College District Board of Trustees; et al.,

Defendants-Appellants.

and

JOHN MATTESON, in his individual and official capacities as Professor of Speech at Los Angeles City College,

Defendant.

No. 09-56238

D.C. No. 2:09-cv-00995-GHK-FFM

U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered September 17, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court
/s/
Theresa Benitez
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. CV 09-0995-GHK (FFMx)
Date June 19, 2009
Title *Jonathan Lopez, et al. v. Kelly G. Candaele, et al.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: (In Chambers) Order re: Defendants' Application to Supplement the Evidence

This matter is before the Court on Defendants Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, Sylvia Scott-Hayes, Gene Little, Jamillah Moore, Allison Jones, and Cristy Passman's (collectively "Defendants") Application to Supplement the Evidence. We have considered the papers filed in support of and opposition to this Application, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the

Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

Plaintiff Jonathan Lopez's ("Plaintiff") case arises from events that occurred on the Los Angeles City College ("LACC") campus beginning in November of 2008, when the Los Angeles Community College District ("District") and LACC's Sexual Harassment Policy ("Policy") was allegedly applied to Plaintiff as a result of a presentation he made in his speech class. (Comp. 8.) At the June 10, 2009 hearing on Plaintiff's Motion for Preliminary Injunction, we took the matter under submission. Defendants now move to supplement the record with evidence that the contested portions of the Policy were repealed on June 13, 2007. (Application, 2.)

The submitted Policy, in its pre-June 13, 2007 form, is still readily available to students searching webpages maintained by the District and LACC. (Lopez Decl.) Thus, students are still subject to it. We therefore continue to consider the submitted Policy.

We will not rule on the new Policy, in effect after June 13, 2007, based on the minimal briefing submitted at this time. If Plaintiff is unsatisfied with the new policy and wishes to challenge it, Plaintiff must meet and confer with Defendants, then the Parties must file a joint brief specifying which parts of the new Policy are unconstitutional, and each side's arguments.

Accordingly, Defendants' Application to Supplement the Evidence is **DENIED**.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____ Bea _____

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JONATHAN LOPEZ,

Plaintiff,

vs.

KELLY G. CANDAELE, MONA FIELD, GEORGIA L. MERCER, NANCY PEARLMAN, ANGELA J. REDDOCK, MIGUEL SANTIAGO, SYLVIA SCOTT-HAYES, in their individual and official capacities as members of the Los Angeles Community College District Board of Trustees; **GENE LITTLE**, in his individual and official capacities as Director of the Los Angeles Community College District Office of Diversity Programs; **JAMILLAH MOORE**, in her individual and official capacities as President of Los Angeles City College; **ALLISON JONES**, in her individual and official capacities as

Case No.

DEMAND FOR JURY TRIAL

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, MONETARY DAMAGES, AND ATTORNEYS' FEES AND COSTS

Dean of Academic Affairs at Los Angeles City College; **CRISTY PASSMAN**, in her individual and official capacities as Compliance Officer at Los Angeles City College; **JOHN MATTESON**, in his individual and official capacities as Professor of Speech at Los Angeles City College,

Defendants.

Plaintiff Jonathan Lopez, by and through counsel, and for his Verified Complaint against Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, Sylvia Scott-Hayes, members of the Los Angeles Community College District Board of Trustees; Gene Little, Director of the Los Angeles Community College District Office of Diversity Programs; Jamillah Moore, President of Los Angeles City College; Allison Jones, Dean of Academic Affairs at Los Angeles City College; Cristy Passman, Compliance Officer at Los Angeles City College; and John Matteson, Professor of Speech at Los Angeles City College, hereby states as follows:

INTRODUCTION

1. This is a civil action seeking injunctive, declaratory, and monetary relief, including attorney's fees and costs, to vindicate and to safeguard Plaintiff Jonathan Lopez's fundamental rights to freedom of speech, due process of law, and equal protection under law as secured by the First and Fourteenth Amendments to the United States Constitution.

2. Los Angeles Community College District ("District"), one of California's largest public community college districts, systematically prohibits and punishes political and religious speech by students that is outside the campus political mainstream. Students who matriculate at schools within the District are promised a forum for free debate and free exchange of ideas. However, some views are more welcome than others.

3. This case arises from policies and actions of public officials employed by Los Angeles City College ("College") and the District that restrict and abridge the expressive rights of college students. During the fall 2008 semester, College officials censored Plaintiff Jonathan Lopez's public expression and then retaliated against him for reporting the censorship. When delivering a speech in class pursuant to an open-ended assignment, Mr. Lopez was silenced by Defendant John Matteson because of the content and viewpoint of his speech. Matteson refused to allow

Mr. Lopez to finish his assignment, publically accused him of being a "fascist bastard," and refused to give Mr. Lopez a grade for the assignment, telling him instead to "ask God" for his grade. Mr. Lopez reported these actions to Defendant Allison Jones, who took no action to correct the censorship. When Defendant Matteson saw Mr. Lopez reporting the incident to Jones, he told Mr. Lopez that he would find a way to get him expelled. When Mr. Lopez reported all of these actions to Defendants Jones and Jamillah Moore, they took no action to protect his constitutional rights, and instead accused him of engaging in hate speech.

4. The District, acting through its trustees and administrators, also enforces a vague and overbroad speech code that chills protected student speech by conditioning punishment on the subjective reactions of listeners. This speech code is enforced, in part, through a system of reporting that encourages students to file complaints about their fellow students whenever those students utter words or engage in actions deemed subjectively "offensive" or "harassing." Indeed, Defendant Matteson used the District speech code to chill Mr. Lopez's expression on campus.

5. The aforementioned policies are challenged on their face and as applied to Plaintiff Jonathan Lopez.

6. Defendants' policies and actions have deprived and will continue to deprive Plaintiff Jonathan Lopez of his paramount rights and guarantees under the United States Constitution.

7. Each and every act of Defendants alleged herein was committed by Defendants, each and every one of them, under the color of state law and authority.

JURISDICTION & VENUE

8. This action raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988.

9. This Court has original jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1343.

10. This Court has authority to grant the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202, the requested injunctive relief under 28 U.S.C. § 1343(a)(3-4), the requested damages under 28 U.S.C. § 1343(a)(4), and attorneys' fees under 42 U.S.C. § 1988(b).

11. Venue is proper in the United States District Court for the Central District of California under 28 U.S.C. § 1391, because the events giving rise to the claims occurred in this District, and

because at least one Defendant resides in this District.

PLAINTIFF

12. Plaintiff Jonathan Lopez is, and was at all times relevant to this Complaint, a resident of Los Angeles, California, and a student at the College.

DEFENDANTS

13. Defendant Kelly G. Candaele is, and was at all times relevant to this Complaint, President and a member of the District Board of Trustees. In his official capacity as a member of the Board of Trustees, Candaele is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Candaele acted under color of state law when he violated Mr. Lopez's First and Fourteenth Amendment rights. He is sued in his individual and official capacities.

14. Defendant Mona Field is, and was at all times relevant to this Complaint, Vice President and a member of the District Board of Trustees. In her official capacity as a member of the Board of Trustees, Field is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community

colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Field acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

15. Defendant Georgia L. Mercer is, and was at all times relevant to this Complaint, a member of the District Board of Trustees. In her official capacity as a member of the Board of Trustees, Mercer is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Mercer acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

16. Defendant Nancy Pearlman is, and was at all times relevant to this Complaint, a member of the District Board of Trustees. In her official capacity as a member of the Board of Trustees, Pearlman is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Pearlman acted under color of state law

when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

17. Defendant Angela J. Reddock is, and was at all times relevant to this Complaint, a member of the District Board of Trustees. In her official capacity as a member of the Board of Trustees, Reddock is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Reddock acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

18. Defendant Miguel Santiago is, and was at all times relevant to this Complaint, a member of the District Board of Trustees. In his official capacity as a member of the Board of Trustees, Santiago is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Santiago acted under color of state law when he violated Mr. Lopez's First and Fourteenth Amendment rights. He is sued in his individual and official capacities.

19. Defendant Sylvia Scott-Hayes is, and was at all times relevant to this Complaint, a member of the District Board of Trustees. In her official capacity as a member of the Board of Trustees, Scott-Hayes is responsible for adopting rules and regulations pursuant to Cal. Educ. Code § 70902 that govern California state community colleges within the District, including rules and regulations that govern student conduct, and for providing oversight for District employees. Defendant Scott-Hayes acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

20. Defendant Gene Little is, and was at all times relevant to this Complaint, the Director of the District's Office of Diversity Programs. Defendant Little's duties include the oversight of the District's Office of Diversity Programs, developing and implementing the District's policies and procedures, addressing discrimination and sexual harassment issues, investigating, resolving and recommending resolutions to discrimination and sexual harassment complaints, overseeing federal compliance, serving as a resource for students, and coordinating training workshops. Defendant Little acted under color of state law when he violated Mr. Lopez's First and Fourteenth Amendment rights. He is sued in his individual and official capacities.

21. Defendant Jamillah Moore is, and was at all times relevant to this Complaint, President

of Los Angeles City College, a college within the District. Defendant Moore's duties include the oversight of the College, the execution of policies and regulations that govern the College, and decision-making concerning student and faculty discipline. Defendant Moore acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

22. Defendant Allison Jones is, and was at all times relevant to this Complaint, Dean of Academic Affairs at Los Angeles City College, a college within the District. Defendant Jones' duties include overseeing academic administration, student matters and faculty employment, including the policies and procedures that govern the College. Defendant Jones acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

23. Defendant Cristy Passman is, and was at all times relevant to this Complaint, the Compliance Officer at Los Angeles City College, a college within the District. Defendant Passman's duties include the oversight of the College's Compliance Office, developing and implementing the District's policies and procedures at the College, addressing discrimination and sexual harassment issues, investigating, resolving and recommending resolutions to discrimination and sexual harassment complaints, overseeing federal compliance, serving as a resource for students, and

coordinating training workshops. Defendant Passman acted under color of state law when she violated Mr. Lopez's First and Fourteenth Amendment rights. She is sued in her individual and official capacities.

24. Defendant John Matteson is, and was at all times relevant to this Complaint, Professor of Speech at Los Angeles City College. Defendant Matteson's duties include teaching and oversight of student education, including enforcement of District and College policies and procedures. Defendant Matteson acted under color of state law when he violated Mr. Lopez's First and Fourteenth Amendment rights. He is sued in his individual and official capacities.

FACTUAL BACKGROUND

A. The College's Retaliation Against Lopez's Speech

25. Mr. Lopez is a Christian and, as a tenet of his faith, he shares his beliefs about Christianity with others, particularly, his fellow students. Mr. Lopez believes sharing his beliefs about Christianity is a religious duty. Mr. Lopez often discusses his faith and how it applies to guide his views on political, social, and cultural issues and events.

26. In an effort to comply with his duty to share his Christian beliefs with others, Mr. Lopez looks for opportunities to speak with other students about his faith. Sometimes this occurs

between classes among friends and fellow students, and sometimes during appropriate class opportunities.

27. Mr. Lopez is pursuing an associate degree from the College.

28. During the fall 2008 semester at the College, Mr. Lopez was a student in Speech 101: Intro to Public Speaking ("Speech 101"), which was taught by Defendant Matteson.

29. Speech 101 included several speaking assignments throughout the semester, during which students presented different types of speeches. According to the Speech 101 syllabus, the speaking assignments included a delivery speech, culture speech, informative speech, and persuasive speech. A copy of the Speech 101 syllabus is attached as Exhibit 1 to this Complaint.

30. During the class, Defendant Matteson assigned his students to give an informative speech. He said it could cover any topic, had to last between six and eight minutes, and could include poster board presentation aids.

31. Defendant Matteson created a public forum for free speech when he gave the Speech 101 students the informative speech assignment.

32. On or about November 24, 2008, Mr. Lopez attempted to give his informative speech during class.

33. Mr. Lopez's informative speech discussed the topic of God and the ways in which he has witnessed God act both in his life and in the lives of others through miracles. His speech included a description of his religious views.

34. In the middle of the speech, Mr. Lopez addressed the issues of God and morality. He referred to the dictionary definition of marriage as being between a man and a woman and also read two verses from the Bible.

35. When Mr. Lopez said this, Defendant Matteson interrupted him and refused to allow him to finish his speech.

36. Defendant Matteson then called Mr. Lopez a "fascist bastard," and refused to allow him to finish the speech. Defendant Matteson told the other students in the class that they could leave if they were offended by Mr. Lopez. When no one got up to leave, Matteson formally dismissed the class.

37. Defendant Matteson censored Mr. Lopez's speech because of the religious content and viewpoint of his expression.

38. Defendant Matteson allowed other students to present informative speeches on food, how to play a musical instrument, foreign countries, and other topics.

39. As Mr. Lopez prepared to leave the class, he found that Defendant Matteson left an

evaluation form on his backpack that specified no grade for the informative speech and instead instructed Mr. Lopez to "[a]sk God what your grade is." Defendant Matteson also wrote on the evaluation form that "prostyelsyszing [sic] is inappropriate in public school." A copy of the Informative/Evaluation form is attached as Exhibit 2 to this Complaint.

40. Defendant Matteson censored Mr. Lopez's speech because of his religious beliefs and membership in a protected class.

41. Defendant Matteson took these actions against Mr. Lopez's speech while acting under color of state law.

42. Several weeks earlier, after the November presidential election, Defendant Matteson announced to the Speech 101 class that he was upset because he thought our society cared more about animals than people. He then said that "if you voted yes on Proposition 8, you are a fascist bastard."

43. On information and belief, Proposition 8 was a state ballot measure to amend the state constitution to define marriage as between one man and one woman.

44. Mr. Lopez felt intimidated and threatened by Defendant Matteson's statement after the election.

45. The combination of Defendant Matteson's statement after the election and his actions on November 24 have caused Mr. Lopez to refrain from expressing his religious beliefs about political, social, and cultural issues and events while on campus.

46. On or about November 25, 2008, Mr. Lopez met with Defendant Jones to describe Defendant Matteson's discriminatory actions on November 24, 2008.

47. On December 1, 2008, Mr. Lopez and another student arrived to Speech 101 a few minutes late. To prevent interrupting speakers, Defendant Matteson's class policy required students to wait outside the classroom if someone was giving a speech, and enter once they heard applause. When Mr. Lopez approached the open classroom door, he did not hear anyone speaking; so he and the other student entered. Someone was speaking, so Mr. Lopez apologized to the class. However, Defendant Matteson confronted Mr. Lopez in front of the class, saying that it was "not very Christian of you" to enter when someone was speaking.

48. As a result of Defendant Matteson's actions on December 1, Mr. Lopez feels like he is being treated differently than other students and people of faith because of his religious beliefs.

49. After class on December 1, 2008, Mr. Lopez delivered a written description of the

November 24, 2008 incident to Defendant Jones. Defendant Matteson saw Mr. Lopez do this and confronted him about it. During this confrontation, Mr. Matteson said that he would make sure Mr. Lopez was expelled from school.

50. On December 2, 2008, Mr. Lopez sent a demand letter to Defendants Moore and Jones, through counsel, informing them of these events and requesting that they take immediate action to correct Defendant Matteson's discriminatory and retaliatory actions. A copy of the letter from counsel for Mr. Lopez to Defendants Moore and Jones is attached as Exhibit 3 to this Complaint.

51. On December 4, 2008, Defendant Jones responded to Mr. Lopez's demand. Jones refused to take any immediate action to protect Mr. Lopez's First and Fourteenth Amendment rights and repudiate Defendant Matteson's actions. A copy of Defendant Jones' December 4, 2008 letter to counsel for Mr. Lopez is attached as Exhibit 4 to this Complaint.

52. Instead, Defendant Jones wrote that she received two statements from other students in Speech 101 who "were deeply offended" by Mr. Lopez's speech. Allegedly, one student's statement said "I also do not believe that our classroom is the proper platform for him to spout his hateful propaganda," and, allegedly, the second student wrote, "I don't know what kind of actions can be taken in this situation, but I expect that this

student should have to pay some price for preaching hate in the classroom." (*See* Ex. 4.)

53. Defendant Jones said that Defendant Matteson's discipline, if any, would be handled privately.

54. On December 5, 2008, counsel for Mr. Lopez sent a second demand letter to Defendants Moore and Jones requesting that they take immediate action to publically repudiate Defendant Matteson's actions and remedy the constitutional injuries Mr. Lopez suffered at the College. A copy of Mr. Lopez's second demand letter of December 5, 2008 is attached as Exhibit 5 to this Complaint.

55. On December 8, 2008, Defendant Jones responded to Mr. Lopez's second demand letter by stating: "We believe that we have promptly, diligently and appropriately addressed Mr. Hacker's [sic] complaints." She wrote that any service of process or tort claims could be served on the District's General Counsel. A copy of Defendant Jones' December 8, 2008 letter to counsel for Mr. Lopez is attached as Exhibit 6 to this Complaint.

56. Defendants Moore and Jones took these actions against Mr. Lopez's speech while acting under color of state law.

57. Mr. Lopez has not received a grade for his informative speech about God and miracles.

58. The statements and actions of Defendants Moore and Jones have caused Mr. Lopez to self-censor his views on campus. Mr. Lopez cannot express his Christian viewpoint in class, with friends, or with faculty and staff for fear of creating "offense" and being punished under College or District policies.

59. Defendant Moore's, Jones', and Matteson's actions constitute unconstitutional content-based and viewpoint discrimination and retaliation against Mr. Lopez because of his religious beliefs and protected speech.

B. The District's Speech Code

60. The District promulgates Board Rules and Administrative Regulations pursuant to authority vested in it under Cal. Educ. Code §§ 66300 and 70902.

61. Board Rules 2312 and 9801 give the District Board of Trustees power to establish rules and regulations governing student conduct.

62. Board Rule 9802 makes Defendant Moore responsible for enforcing Board Rules and Administrative Regulations at the College, including developing guidelines, applying sanctions, and taking other appropriate action consistent with the rules and regulations.

63. Board Rule 9803 states that "[c]onduct in all of the Los Angeles Community

Colleges must conform to District and college rules and regulations. Violations of such rules and regulations may result in disciplinary action depending on the individual's status as student, faculty, staff or visitor."

64. Board Rule 15001 contains the following statement about the District's policy on sexual harassment:

> The policy of the Los Angeles Community College District is to provide an educational, employment and business environment free from unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communications constituting sexual harassment. Employees, students, or other persons acting on behalf of the District who engage in sexual harassment as defined in this policy or by state or federal law shall be subject to discipline, up to and including discharge, expulsion or termination of contract.

A copy of Board Rule 15001 is attached as Exhibit 7 to this Complaint.

65. The College's Student Handbook contains the same policy language as Board Rule 15001. A copy of the College's Student Handbook is attached as Exhibit 8 to this Complaint.

66. Board Rule 15003 defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions:
>
> . . .
>
> 3. The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

(*See* Ex. 7).

67. Board Rule 15003 does not define the term "negative impact" or explain what "intimidating, hostile or offensive" means.

68. Defendants Candaele, Field, Mercer, Pearlman, Reddock, Santiago, and Scott-Hayes are the final decision makers for the District in resolving complaints of sexual harassment. (*See* Ex. 7, Board Rule 15017.)

69. Defendant Little develops and implements sexual harassment policies pursuant to District Board Rules, policies, and procedures.

70. Defendant Passman develops and implements sexual harassment policies at the College pursuant to District Board Rules, policies, and procedures.

71. Board Rule 15017 states that, "[d]isciplinary action against students shall include, without limitation, verbal warnings, probation, suspension or expulsion." (*See* Ex. 7.)

72. The College's Rules for Student Conduct contains the following statement: "Student conduct in all of the Los Angeles Community Colleges must conform to District and College rules and regulations." The Rules for Student Conduct are contained in the Student Handbook. (*See* Ex. 8.) The District Board of Trustees rules establishing the Rules for Student Conduct are attached as Exhibit 9 to this Complaint.

73. Students are subject to disciplinary action for violating District and College rules and regulations.

74. The District's Office of Diversity Programs ("ODP") is responsible for developing and implementing the District's policies and procedures on harassment; addressing discrimination and sexual harassment issues; investigating, resolving, and recommending resolutions to discrimination and sexual harassment complaints; overseeing federal compliance; and coordinating training workshops.

75. The District ODP also oversees the College's Compliance Office, which, like the ODP, is responsible for developing and implementing the District's policies and procedures on harassment; addressing discrimination and sexual harassment issues; investigating, resolving, and recommending resolutions to discrimination and sexual harassment complaints; overseeing federal compliance; and coordinating training workshops.

76. The District's ODP publishes a webpage discussing sexual harassment. A copy of the District's ODP "Sexual Harassment" webpage is attached as Exhibit 10 to this Complaint.

77. The District's ODP Sexual Harassment webpage defines sexual harassment as "[c]onduct has the purpose or effect of having a negative impact upon work or academic performance, or creating an intimidating, hostile, or offensive work or educational environment." It also states that sexual harassment "can be intentional or unintentional." The District's ODP Sexual Harassment webpage does not define "negative impact" or "intimidating, hostile, or offensive." (*See* Ex. 10.)

78. The District ODP Sexual Harassment webpage also provides the following examples of sexual harassment:

> What type of behavior is sexual harassment?

> It is important to be aware that sexual remarks or physical conduct of a sexual nature may be offensive or can make some people uncomfortable even if you wouldn't feel the same way yourself.
>
> It is therefore sometimes difficult to know what type of behavior is sexual harassment.
>
> The following examples will give you a guide:
>
> - Verbal harassment or sexual abuse
> - Written notes or emails of a sexual nature
>
> . . .
>
> - Disparaging sexual remarks about your gender
>
> . . .
>
> - Making unwelcome, unsolicited contact with sexual overtones (written, verbal, physical and/or visual contact)

(*See* Ex. 10.)

79. The District ODP Sexual Harassment webpage also contains the following statement discussing guidelines for avoiding sexual harassment:

> If you follow these simple guidelines it will help you avoid creating a hostile

environment and making someone else feel uncomfortable:

- If unsure if certain comments or behavior are offensive do not do it, do not say it.

. . .

- Ask if something you do or say is being perceived as offensive or unwelcome. If the answer is yes, stop the behavior.

. . .

(*See* Ex. 10.)

80. The District's ODP Sexual Harassment webpage also states that "[t]he victim [of sexual harassment] does not have to be the person directly harassed but could be anyone affected by the offensive conduct." (*See* Ex. 10.)

81. The District's ODP Sexual Harassment webpage does not define "offensive."

82. The College's Compliance Office also publishes a webpage discussing sexual harassment. A copy of the College Compliance Office "Sexual Harassment" webpage is attached as Exhibit 11 to this Complaint.

83. The College's Sexual Harassment webpage defines sexual harassment as "[c]onduct [that] has the purpose or effect of having a negative impact upon work or academic

performance, or creating an intimidating, hostile, or offensive work or educational environment." It also states that sexual harassment "can be intentional or unintentional." The Sexual Harassment webpage does not define "negative impact" or "intimidating, hostile, or offensive." (*See* Ex. 11.)

84. When listing the "common" types of sexual harassment, the College's Sexual Harassment webpage states:

> Sexual Harassment based on your gender: This is generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex.

(*See* Ex. 11.)

85. In discussing guidelines for avoiding sexual harassment, the College's Sexual Harassment webpage states:

> If unsure if certain comments or behavior are offensive, do not do it, do not say it.

> . . .
> If something you do or say is being perceived as offensive or unwelcome. [sic] If the answer is yes, stop the behavior.
> . . .

The Sexual Harassment webpage does not define "offensive." (*See* Ex. 11.)

86. The District ODP publishes a webpage entitled "Overview," which contains discussions and policy statements regarding discrimination and sexual harassment. A copy of the District ODP Overview webpage is attached as Exhibit 12 to the Complaint.

87. The District ODP Overview webpage defines sexual harassment with the following statement:

> Sexual harassment is one form of discrimination and it is generally defined as:
> - unwelcome sexual advances and/or
> - requests for sexual favors by a male or female
>
> It is physical, verbal, or visual behavior that is sexual in nature, repeated, and interferes with your ability to study or work. It is conduct that has created a hostile or intimidating environment.

(*See* Ex. 12.)

88. The College's Compliance Office also publishes a webpage entitled "Overview," which contains discussions and policy statements regarding discrimination and sexual harassment. A copy of the College's Overview webpage is attached as Exhibit 13 to this Complaint.

89. The College's Overview webpage defines sexual harassment with the following statement:

> Sexual harassment is one form of discrimination and it is generally defined as: unwelcome sexual advances and/or, requests for sexual favors by a male or female and/or, other physical, verbal, or visual conduct of a sexual nature. To be legally defined as sexual harassment behavior should meet one or both of the following requirements:
>
> . . .
>
> 2. Hostile environment harassment
> This is when an individual or group's conduct has a negative impact on you, thus creating a hostile or intimidating work and/or academic environment. For example, if a work colleague continually tells sexual jokes, and/or makes obscene gestures that make you feel uncomfortable, this can be called a "hostile environment."

(*See* Ex. 13.)

90. The College's Overview webpage contains the following list of what students can do about sexual harassment:

> There are six simple rules you can follow to ensure your behavior is not unlawful:
>
> 1. If you are unsure if certain comments or behavior are offensive do not say it, do not do it. Respect the people around you. Be aware of their feelings.
> . . .
> 4. Ask if something you do or say is being perceived as offensive, pervasive, or unwelcome. If the answer is yes, stop the behavior.

(*See* Ex. 13.)

91. The College's Overview webpage does not define "offensive."

92. Mr. Lopez finds himself consistently engaged in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101. He fears that the discussion of his religious, political, social, and/or cultural views regarding these issues may be sanctionable under the speech code.

93. On or about December 2, 2008, Mr. Lopez turned in a paper with his proposed topics for a persuasive speech in Speech 101. His topics

included global warming, protected sex, exercising your free speech, driving safely, and staying physically fit. In grading the topic paper, Defendant Matteson wrote under the "exercising your free speech" topic that Mr. Lopez should "Remember – you agreed to student code of conduct at LACC." A copy of Mr. Lopez's December 2, 2008 persuasive speech topic paper is attached as Exhibit 14 to this Complaint.

94. Defendant Matteson's actions chilled Mr. Lopez expression pursuant to the District's speech code.

95. The combination of Defendant Matteson's censorship and hostility toward Mr. Lopez's Christian viewpoints, Defendant Moore's and Jones' accusations that Lopez's speech "offended" others, and the District's sexual harassment policies that prohibit students from saying anything "offensive," has chilled Mr. Lopez's expression at the College and caused him to refrain from discussing his beliefs with respect to political, social, and cultural issues and events.

96. Board Rule 15003, the Rules for Student Conduct, and the District's and College's Sexual Harassment and Overview webpages have a chilling effect on Mr. Lopez's rights, and those of all students at the District, to freely and openly engage in appropriate discussions of his religious, political, social, and/or cultural beliefs.

97. Mr. Lopez wishes to freely express his views on the College's campus, but has not done so since being silenced by Defendant Matteson on November 24, December 1, and December 2, 2008, for fear of expulsion.

98. Defendants knew or should have known that retaliating against and denying Mr. Lopez's right to free speech at the College is a clear violation of his constitutional rights.

99. Defendants' restrictions on speech are not content neutral or narrowly tailored, and do not leave open ample alternative channels for communication.

100. There is no reasonable basis for Defendants' restrictions on speech.

101. Because Mr. Lopez has been, and is being, prevented from exercising his First Amendment rights at the College, he is suffering irreparable injury from the policies and actions of Defendants.

102. Each of the adverse actions outlined above – from the improper censorship of Mr. Lopez's protected speech activities, to the refusal to grade his class work, to the threat of the speech code, to the threat of expulsion – were based in whole or in part upon his statements regarding his religious beliefs and marriage on or about November 24, 2008.

103. Defendants' actions chilled Mr. Lopez's speech, damaged his reputation, and irreparably injured his constitutional rights to free speech and equal protection of law.

104. Defendants' policies and actions create an atmosphere of intimidation on campus. This atmosphere is chilling the speech of others holding viewpoints like Mr. Lopez's who are not before the Court.

105. It is extremely distressing to Mr. Lopez that his name is linked on campus (and probably elsewhere) with allegations that he violated District and College rules and policies. No amount of diligence and discovery by Mr. Lopez, in the context of litigation or otherwise, could ever determine the extent to which his name is now linked with those allegations in the minds of people, known and unknown to him.

FIRST CAUSE OF ACTION
First Amendment Retaliation
(42 U.S.C. § 1983)

106. Plaintiff repeats and realleges each of the foregoing allegations in this Complaint.

107. By silencing Mr. Lopez's protected expression in a public forum, refusing to grade his presentation, prohibiting his expression of religious viewpoints, threatening enforcement of the speech code, and threatening to expel him, among other things, Defendants, acting under color of state law

and according to policy and practice, have explicitly and implicitly discriminated against Mr. Lopez based on the content and viewpoint of his speech, retaliated against him because of his free expression, and deprived him of his clearly established rights to freedom of speech and expression secured by the First Amendment to the United States Constitution.

108. Because of Defendants' policies and actions, Mr. Lopez has suffered, and continues to suffer, economic injury and irreparable harm. He, therefore, is entitled to an award of monetary damages, including punitive damages, and equitable relief.

109. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. Lopez is entitled to a declaration that Defendants violated his First Amendment rights and an injunction against their actions. Additionally, Mr. Lopez is entitled to damages in an amount to be determined by the evidence and this Court and the reasonable costs of this lawsuit, including his reasonable attorneys' fees.

SECOND CAUSE OF ACTION
Violation of Plaintiff's First Amendment Right to Freedom of Speech (42 U.S.C. § 1983)

110. Plaintiff repeats and realleges each of the foregoing allegations in this Complaint.

111. By silencing Mr. Lopez's protected expression in a public forum, refusing to grade his presentation, prohibiting his expression of religious viewpoints, threatening enforcement of the speech code, and threatening to expel him, among other things, Defendants, acting under color of state law and according to policy and practice, have explicitly and implicitly discriminated against Mr. Lopez based on the content and viewpoint of his speech, chilled his free expression, and deprived him of his clearly established rights to freedom of speech and expression secured by the First Amendment to the United States Constitution.

112. Because of Defendants' policies and actions, Mr. Lopez has suffered, and continues to suffer, economic injury and irreparable harm. He, therefore, is entitled to an award of monetary damages, including punitive damages, and equitable relief.

113. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. Lopez is entitled to a declaration that Defendants violated his First Amendment rights and an injunction against their actions. Additionally, Mr. Lopez is entitled to damages in an amount to be determined by the evidence and this Court and the reasonable costs of this lawsuit, including his reasonable attorneys' fees.

THIRD CAUSE OF ACTION
Violation of Plaintiff's Fourteenth Amendment Right to Equal Protection Under Law (42 U.S.C. § 1983)

114. Plaintiff repeats and realleges each of the foregoing allegations in this Complaint.

115. By silencing Mr. Lopez's protected expression in a public forum, refusing to grade his presentation, prohibiting his expression of religious viewpoints, threatening enforcement of the speech code, threatening to expel him, but allowing other students to speak on any topic of their choosing in the classroom, among other things, Defendants, acting under color of state law and according to policy and practice, have explicitly and implicitly discriminated against Mr. Lopez based on the content and viewpoint of his speech, treated him differently than similarly situated students because of his membership in a protected class and because of his exercise of fundamental rights, and have therefore deprived Mr. Lopez of his clearly established right to equal protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

116. Because of Defendants' policies and actions, Mr. Lopez has suffered, and continues to suffer, economic injury and irreparable harm. He, therefore, is entitled to an award of monetary damages, including punitive damages, and equitable relief.

117. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. Lopez is entitled to a declaration that Defendants violated his Fourteenth Amendment rights and an injunction against their actions. Additionally, Mr. Lopez is entitled to damages in an amount to be determined by the evidence and this Court and the reasonable costs of this lawsuit, including his reasonable attorneys' fees.

FOURTH CAUSE OF ACTION
Violation of Plaintiff's First and Fourteenth Amendment Rights to Freedom of Expression and Due Process of Law (42 U.S.C. § 1983) – Speech Code

118. Plaintiff repeats and realleges each of the foregoing allegations in this Complaint.

119. The District's speech code outlined in this Complaint conditions compliance with Board Rules, Rules for Student Conduct, and District ODP policies and procedures, and College Compliance Office policies and procedures on the subjective emotional experience of the listener, and limits and prohibits constitutionally-protected speech without providing any objective guidelines by which students such as Mr. Lopez can guide their behavior, or by which administrators may objectively and precisely apply the policies.

120. The vagueness and overbreadth of these policies has the effect of chilling the speech of students on District campuses, such as Mr. Lopez.

121. The District's speech code is both vague and overbroad and has therefore deprived Mr. Lopez of his clearly-established right of due process of law guaranteed by the Fourteenth Amendment and his clearly-established right to freedom of expression guaranteed by the First Amendment.

122. Because of Defendants' policies and actions, Mr. Lopez has suffered, and continues to suffer, economic injury and irreparable harm. He, therefore, is entitled to an award of monetary damages, including punitive damages, and equitable relief.

123. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. Lopez is entitled to a declaration that Defendants violated his First and Fourteenth Amendment rights and an injunction against the speech code. Additionally, Mr. Lopez is entitled to damages in an amount to be determined by the evidence and this Court and the reasonable costs of this lawsuit, including his reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Jonathan Lopez respectfully requests trial by jury and the following relief:

A) A preliminary and permanent injunction against the Defendants, their agents, servants, employees, officials, or any other

person acting in concert with them or on their behalf, invalidating and restraining them from enforcing customs, procedures, codes, practices and/or policies as they pertain to the conduct made the subject of this Verified Complaint, specifically the discussed portions of District Board Rule 15003, the College's Rules for Student Conduct, the District's Office of Diversity Programs Sexual Harassment and Overview policies, and the College's Compliance Office Sexual Harassment and Overview policies, or that in any way discriminate against Mr. Lopez on the basis of his viewpoint or the content of his expression, or because of his membership in a protected class or exercise of fundamental rights;

B) A preliminary and permanent injunction prohibiting the Defendants and their agents from restricting student speech in the classroom when students are given open-ended assignments.

C) A declaration stating that the conduct of Defendants and Defendants' policies restricting speech on campuses within the District, specifically the discussed portions of the District's Board Rule 15003, the College's Rules for Student Conduct, the District's Office of Diversity Programs Sexual Harassment and Overview policies, and the College's Compliance Office Sexual

Harassment and Overview policies, are unconstitutional both facially and as applied to Mr. Lopez under the First and Fourteenth Amendments;

D) A declaration stating that the conduct of Defendants and Defendants' policies restricting speech in the classroom, specifically the silencing of Mr. Lopez's speech, was unconstitutional under the First and Fourteenth Amendments;

E) That this Court adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy, in order that such declaration shall have the force and effect of final judgment;

F) An award of compensatory and/or nominal damages to Mr. Lopez against the individual defendants in the amount of five thousand dollars ($5,000.00);

G) An award of punitive damages to Mr. Lopez against the individual defendants for their actions in retaliating against Mr. Lopez and violating his First Amendment right to freedom of speech and Fourteenth Amendment rights to due process and equal protection under law;

H) Mr. Lopez's reasonable costs and expenses of this action, including attorneys' fees, in accordance with 42 U.S.C. § 1988;

I) All other and further relief as this Court deems just and proper; and

J) That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's orders.

Respectfully submitted this the 11 day of February, 2009.

By: s/David J. Hacker

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DEMAND FOR TRIAL BY JURY

Plaintiff demands trial by jury of all matters so triable herein.

By: s/David J. Hacker

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VERIFICATION OF COMPLAINT

I, Jonathan Lopez, a citizen of the United States and resident of the State of California, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

Executed this 27 day of January, 2009, at Los Angeles, California.

s/Jonathan Lopez
Jonathan Lopez

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I. ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly decided this case. In *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010), the Court thoroughly analyzed the elements of Article III standing before concluding it was not shown here.

Petitioner Jonathan Lopez, a student in the Los Angeles Community College District ("the District"), asserted a facial overbreadth challenge to the District's former sexual harassment policy. Petitioner had been subjected to inappropriate comments and conduct by his speech class professor following a classroom speech containing religious themes. But as the Court of Appeals opinion describes, the record contained no evidence that the District intended to invoke the sexual harassment policy against Petitioner. No one even *mentioned* the policy to him. After the administration learned all the facts regarding the classroom incidents, the District stated that no student, including Petitioner Lopez, would be disciplined. Instead, the professor was disciplined, and Petitioner ultimately received an "A" in the class. *Lopez*, 630 F.3d at 784.

Petitioner's evidence did not show that he sought to engage in any speech that would actually violate the District's sexual harassment policy. His verified complaint stated only, in very general terms, that he intended to speak about "his Christian views on politics, morality, social issues, religion, and the like," and that he wished to "share[ ] his beliefs about

Christianity with others," which means "discuss[ing] his faith and how it applies to guide his views on political, social, and cultural issues and events," but felt chilled from speaking by the sexual harassment policy. *Lopez*, 630 F.3d at 790. As the Court of Appeals explained, this does not even arguably qualify as "sexual harassment" under the policy Petitioner challenged. The lack of any credible threat that the District would enforce the policy against Petitioner led the Court of Appeals to conclude that Petitioner did not satisfy the "'irreducible constitutional minimum of standing' necessary to challenge the policy." *Id.* at 785 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The Petition's argument that this Court's decision creates a circuit split is unfounded. The two primary circuit court cases Petitioner cites, *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010), and *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), rest in pertinent part on the doctrine concerning facial overbreadth challenges, not Article III standing. Also, to the extent *Dambrot* can be interpreted to address Article III standing, its analysis is superseded by the Sixth Circuit's decision in *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602 (6th Cir. 2008), which directly supports the decision here by holding that conclusory allegations of chilling effect on speech in the university context did not confer standing. *Id.* at 610. The third case cited by Petitioner for a supposed

circuit split, *Zamecnik v. Indian Prairie School Dist.*, 2011 WL 692059 (7th Cir. March 1, 2011), does not address Article III standing requirements or the overbreadth doctrine. It does not even mention them.

Section II of this Brief discusses why the instant case is not part of any circuit split, but is aligned with current United States Supreme Court and Court of Appeals precedent governing principles of standing. Section III of this Brief describes why the Petition's Questions Presented section is flawed and how it purports to present issues for consideration that do not have support in the record. Section IV describes why the *Lopez* case ably follows this Court's guidance on how Article III should interpreted.

II. THERE IS NO CIRCUIT SPLIT CONCERNING WHEN A STUDENT HAS ARTICLE III STANDING TO CHALLENGE A COLLEGE POLICY ON OVERBREADTH GROUNDS

Petitioner contends that the decision of the Court of Appeals contributes to a circuit split. (Petition for Writ of Certiorari at 1.) There is no circuit split, because the cases Petitioner cites as conflicting are distinguishable. Moreover, none actually even discusses Article III standing.

Indeed, the Petition frequently intermingles the generous standing rules applicable to facial overbreadth challenges with the preliminary requirement that one must show Article III standing before being

able even to make such a challenge. A facial overbreadth challenge under the First Amendment exempts a plaintiff from the traditional prudential rule against third party standing, i.e., allows the plaintiff to assert the free speech rights of third parties to show a policy or statute is overbroad. But the overbreadth doctrine does *not* relieve plaintiffs from establishing Article III standing in the first place. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 554 (9th Cir. 2003). It was Article III standing that Petitioner lacked here. *See Lopez*, 630 F.3d at 788-93.

A. *McCauley v. University of the Virgin Islands* Is Distinguishable

The first case cited by Petitioner, *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010), is distinguishable because it addresses standing to challenge provisions based on overbreadth, and does not address Article III standing. In *McCauley*, the student in fact suffered discipline under the policy he challenged, and thus had standing under Article III. The Court was then required to decide whether the law governing overbreadth challenges allowed the student to challenge portions of the student policy in addition to those applied to him.

The underlying facts of *McCauley* confirm that it is rooted only in prudential standing related to facial overbreadth challenges. McCauley, a student at the University of the Virgin Islands, was charged by the

University, and punished, for his speech and conduct toward the victim of an alleged rape. The University found him guilty of violating Paragraph E of the university disciplinary rules involving acts that inflict mental harm on students. The student sued, alleging Paragraph E infringed free speech rights, but also that other Paragraphs were facially overbroad under free speech principles – including B (lewd behavior), H (conduct that causes emotional distress), and R (misbehavior at sports events, concerts, and other events). *McCauley*, 618 F.3d at 238-39. At trial, the student conceded he had suffered "no deprivations" under these paragraphs, but the Third Circuit found his testimony irrelevant. But this was not because the concession did not matter for purposes of Article III standing, but because it did not matter for purposes of an overbreadth challenge, which considers the speech rights of third parties:

> Despite McCauley's trial testimony that he suffered no deprivations from Paragraphs B, H, and R, we conclude that he has standing to challenge those paragraphs. The "judicial prediction or assumption" that Paragraphs B, H, and R "may cause others not before the court to refrain from constitutionally protected speech or expression," *Broadrick*, 413 U.S. at 612, 93 S.Ct. 2908, was not disturbed by McCauley's testimony.

McCauley, 618 F.3d at 238. Indeed, *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), cited by the Third Circuit, is a case addressing facial overbreadth, not injury-in-fact

necessary for standing under Article III. *See id.* at 612-13. Thus, *McCauley* does not address Article III standing. Instead, the Third Circuit evidently assumed standing existed because the plaintiff had been disciplined under the policy. Indeed, the Ninth Circuit in its opinion here distinguishes the *McCauley* decision on this basis. *See Lopez*, 630 F.3d at 792-93.

B. *Dambrot v. Central Michigan University* Is Distinguishable

The second case cited by Petitioner for a circuit split, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), is also inapposite. At the outset, the case contains no discussion of Article III standing at all. As with *McCauley*, its only discussion of standing relates to the ability of plaintiffs asserting overbreadth challenges to assert the rights of third parties. *Id.* at 1182.

In addition, *Dambrot* is distinguishable on its facts. In *Dambrot*, the university's head coach was disciplined, and his agreement to coach was not renewed, because he used a racial slur in talking with the players. He sued claiming wrongful termination. *Id.* at 1181. Several basketball players joined the suit and challenged the harassment policy on overbreadth grounds. *Id.* The record showed that the student basketball players who challenged the university policy on racial harassment themselves used the same racial slur that had caused their coach to lose his job. The District Court sustained the challenge of

the coach and players, and the Sixth Circuit affirmed. *Id.* at 1181-82.

Petitioner suggests that this ruling in *Dambrot* contradicts the *Lopez* holding because the Sixth Circuit allowed the players to proceed with a facial overbreadth challenge without showing they were disciplined or threatened with discipline under the harassment policy. (*See* Petition for Writ of Certiorari at 24.) The contention lacks merit because the record showed that "[t]he players often referred to each other using" the racial slur, including "during games and around campus and in the locker room." *Dambrot*, 55 F.3d at 1180. The student plaintiffs *were* engaged in exactly the same speech that had resulted in discipline of their coach under the policy (and ultimately non-renewal of his contract). This is in direct contrast to this case. Here, Petitioner Lopez did not allege facts to show the District had *ever* viewed speech such as his as violating the District sexual harassment policy, nor did he allege that he wished to engage in any speech which could arguably be viewed as "verbal conduct . . . of a sexual nature" covered by the policy. *See Lopez*, 630 F.3d at 790-91.

Petitioner argues that the Court of Appeals here accepted an argument that the *Dambrot* Court rejected, specifically that a harassment policy is not overbroad if the University disavows any intent to apply it in particular circumstances. (Petition for Writ of Certiorari at 25-26 (citing *Dambrot*, 55 F.3d at 1183).) The contention fails because the Court of Appeals here did not rely on that argument. Indeed, the Court

never needed to reach the merits of the overbreadth challenge. The Court did note a statement in correspondence from Dean Allison Jones to Petitioner's lawyers in response to the Matteson incidents that "First Amendment rights will not be violated." *Lopez*, 630 F.3d at 791-92. But the Court here did not treat the statement by Dean Jones as carving out an exception to the policy. Rather, it was simply one fact among many which persuaded the Court that the District did not believe the sexual harassment policy applied to Lopez's speech at all. *Id.* at 788-92.

C. The Opinion Of The Court Of Appeals Is Consistent With The Sixth Circuit's Decision In *Morrison v. Board of Education of Boyd County*

Even if the 1995 *Dambrot* decision, discussed above, addressed standing (and it did not) the case would be effectively superseded by the Sixth Circuit's own substantially more detailed analysis in its 2008 decision, *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602 (6th Cir. 2008). The case, in fact, confirms that the decision here is aligned with existing case law.

In *Morrison*, a high school student alleged that he wished to express his religious views against homosexuality on campus but did not do so out of fear of violating a policy that prohibited creating a "hostile or abusive educational environment" through statements "insulting" or "stigmatizing" to individuals. *Id.*

at 605-06. The Court held that a student's purely subjective allegations of chilling effect did not confer Article III standing: "With respect to the standing of First Amendment litigants, the Supreme Court is emphatic: 'Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Morrison*, 521 F.3d at 608 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)). The Court further noted that:

> The claim at stake here involves Morrison's choice to chill his own speech based on his perception that he would be disciplined for speaking. . . . [But] the record is silent as to whether the school district threatened to punish or would have punished Morrison for protected speech in violation of its policy.

Id. at 610.

The *Lopez* opinion in the instant case is consistent with *Morrison*.

D. *Zemecnik v. Indian Prairie School District* Is Distinguishable

The third case relied on by Petitioner for a purported circuit split, *Zamecnik v. Indian Prairie School Dist. No. 204*, 2011 WL 692059 (7th Cir. 2011), has no analysis of either Article III standing *or* overbreadth. It does not even contain these words. Nor does the additional case that arises from the same set of facts, *Nuxoll v. Indian Prairie School Dist. No. 204*, 523

F.3d 668 (7th Cir. 2008), which Petitioner offers as a key to the Article III meanings in *Zamecnik*. Petitioner interprets these opinions, taken together, to mean that Nuxoll was allowed to challenge a policy that had never been enforced against him, based only on its chilling effect. This is not accurate.

In *Zamecnik* and *Nuxoll*, a high school stopped one student, Zamecnik, from wearing a t-shirt that contained a message "Be Happy, Not Gay" (the school required that the words "Not Gay" be inked out). Another student, Nuxoll, alleged he wished to wear a t-shirt with the same message, and ultimately succeeded in obtaining injunctive relief allowing him to do so, and nominal damages. The result of these Seventh Circuit cases (and whatever is implied in them concerning standing) does not conflict with *Lopez*. Nuxoll was able to allege and prove he wished to engage in the specific conduct *that had already drawn action* from the school pursuant to its disciplinary policy, specifically wearing a t-shirt that had a very specific message on it. Here, by contrast, Petitioner Lopez did not allege he wished to engage in conduct that constituted "sexual harassment" within the four corners of the policy, or in conduct that had ever been construed as "sexual harassment." No one mentioned the policy to him, and there was no record that the District had enforced the policy against *anyone*. *See Lopez*, 630 F.3d at 791.

The Seventh Circuit said nothing about Article III or the overbreadth doctrine in *Zamecnik*. The case does not establish a circuit split.

E. The Opinion Of The Court Of Appeals Is Consistent With The Fourth Circuit's Unpublished Recent Decision In *Rock for Life UMBC v. Hrabowski*

The decision here *is* consistent with the Fourth Circuit's unpublished but detailed and thorough decision in *Rock for Life UMBC v. Hrabowski*, 2010 WL 5189456 (4th Cir. Dec. 16, 2010). There, the Court found that a plaintiff student-organization that engaged in abortion protests lacked standing to challenge a state university's sexual harassment policy, even though its members had alleged that the policy chilled their expression. The reasoning of the case is similar to that here, and relies in part on the plaintiff's inability to show how the planned speech qualified as sexual harassment under the terms of the policy at issue. *See id.* at **5-7.

F. Other Authorities Cited By Petitioner Are Inapposite

The Petition cites a number of additional cases from the Third Circuit (which decided *McCauley*, discussed above) which the Petition argues create a conflict with the standing analysis of the Court of Appeals in *Lopez*. Like *McCauley*, the cases are inapposite or distinguishable.

First, in *Dejohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), the parties did not argue, and the Court did not discuss, Article III standing. The Court's opinion only recites that the plaintiff, a

history graduate student, felt inhibited in his discussions and class work because of the university's sexual harassment policy. *Id.* at 305. The Court did not consider the issue further. Also, the policy language which it considered applied by its terms in a very nebulous manner to expressive conduct of a "gender-motivated nature." *Id.* No such language exists in the policy at issue in this case.

Similarly, the opinion in *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001), nowhere discusses any challenge to standing. The opinion only recites that plaintiffs were two high school students who wished to "speak out about the sinful nature and harmful effects of homosexuality" and wished to distribute literature, but felt "likely to be punished" under the school's harassment policy. *Id.* at 203-04. The Court's discussion of standing went no further. In addition, the students' statement of intent to speak in *Saxe* more clearly implicates the policy at issue in that case than Lopez's very generalized assertion of his intended speech does the policy in this case. *See Lopez*, 630 F.3d at 790.

The Petition's Section I.E collects a number of additional cases from outside the context of student challenges to college and university policies to support the proposition that proof of an "objectively reasonable" chilling effect will confer Article III standing to make a First Amendment challenge before a law has been enforced against the plaintiff. (*See* Petition for Writ of Certiorari at 30-33.) The cases, which have been culled from a variety of factual contexts, do not

conflict with the *Lopez* decision because *Lopez* does not hold that a pre-enforcement challenge can never be brought – rather, *Lopez* analyzes the particular and unique facts of the instant case, using established case authorities on standing. It determines that based on all the facts and circumstances presented, Lopez did not make a sufficient showing. *Lopez*, 630 F.3d at 794. The *Lopez* decision is fact-based and does *not* present a square conflict with cases considering pre-enforcement challenges in different circumstances.

III. THE "QUESTIONS PRESENTED" IN THE PETITION MISSTATE APPLICABLE FACTS AND LAW

Although the gravamen of the Petition relates to the standing issue, it contains additional significant misstatements regarding this case that must be addressed in this response.

A. The Introduction To The Questions Presented Misstates And Misrepresents The Sexual Harassment Policy At Issue

The introductory language to the Petition's "Question Presented" section argues that the District's policy at issue "prohibits students from engaging in speech deemed 'offensive,' 'harassing,' 'degrading,' and 'sexist' as subjectively defined by listeners and administrators." (Petition for Writ of Certiorari at p.i.) This is a misstatement of the sexual harassment policy at issue. The *only one* of these

words that appears in the policy itself is "offensive," and it applies in the course of defining harassment exactly as this Court has defined it: "verbal conduct" that leads to an "intimidating, hostile, or offensive work or educational environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The actual policy language at issue is section 15003(A), which uses the exact definition of sexual harassment contained in California Education Code section 212.5. It defines harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: . . . (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

Lopez, 630 F.3d at 781.[1] This language is, in turn, based on a federal standard set out by the EEOC in 29 C.F.R. section 1604.11(a). This is the language

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[1] Because the language is derived from Education Code section 212.5, it is not, as Petitioner insinuates, the peculiar creation of administrators at a single college district. It is the language formulated by the California Legislature and has set the legal standard for sexual harassment at colleges throughout California for over twenty years.

considered by the Trial Court here, and the language that is at issue.

The introduction to the Questions Presented section of the Petition improperly weaves advisory wording from former District *websites* into its arguments so that it appears those words were actually *part of* the sexual harassment policy. In doing so, it scrambles both the language and the standards that are actually at issue.

The website phrases are not part of the policy. Students at District colleges could only be disciplined for violation of the policy itself, i.e., Section 15003(A). Indeed, the Trial Court's July 10, 2009 Order, although it cited the website language, only analyzed the terms of Section 15003(A) in making its overbreadth determination and its determination that the policy could not be narrowed. (*See* Petition for Writ of Certiorari at 74a-87a.) It issued a preliminary injunction against Section 15003(A) and websites that quoted, paraphrased, explained, or referenced it. (*Id.* at 69a-70a, 89a (enjoining the District's sexual harassment policy, which it defined as "the Policy").) The Trial Court did not apply its injunction to the website language quoted by Petitioner. Nor would it have been warranted for the Court to do so. The law is clear that language in college publications that is "aspirational rather than restrictive" is not subject to First Amendment scrutiny. *Bair v. Shippensburg University*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003).

The website language imposed no disciplinary requirement.[2]

The Petition mixes words and phrases from Section 15003(A) and from advisory websites in support of virtually *every* major argument. This is confusing and improper. It distorts what Petitioner purports to be the Questions Presented to this Court, and the Court should recognize and reject the approach.

B. The First Question Presented Misstates The Record Below, In Which Petitioner's Evidence Did Not Show An Objectively Reasonable Chilling Effect

The Petition's first purported Question Presented assumes facts not supported by the record on appeal, specifically that the District's sexual harassment policy at issue presented an "objectively reasonable chilling effect on student speech" in this case. (*See*

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[2] Indeed, should this Court grant certiorari and hear the case, the District will be able to show that each website from which Plaintiff quotes makes clear that the actual sexual harassment policy is a separate document. The District website (the Complaint's Exhibit 10) had a link to the "Official LACCD Prohibited Discrimination and Harassment Policy." The District "Overview" page had a link for "more details about sexual harassment." The L.A. City College website (the Complaint's Exhibit 11) advised "[R]ead the . . Sexual Harassment policy" and had a separate link to it. The College "Overview" page (the Complaint's Exhibit 13) advised: "Take the time to read your sexual harassment policy."

Petition for Certiorari at p.i.) The Question Presented asks, essentially, whether an "objectively reasonable chilling effect" will confer standing on students to make a facial challenge to college or university policies. But here, there is no evidence in the record that the District's sexual harassment policy *had* an "objectively reasonable chilling effect" on Petitioner or any other student. The Court of Appeals did not find any chilling effect, and instead – as to Petitioner – found the opposite. The Court summarized its reasoning as follows:

> In sum, Lopez has not proposed an interpretation of the policy that would arguably apply to his intended speech and has not given any details about what he intends to say. Therefore, he has failed to prove his intent to violate the policy. Moreover, Lopez has not shown that the District or LACC has enforced the sexual harassment policy against him, interprets the sexual harassment policy as applying to his speech, or is likely to enforce the policy against him in the future. Under these circumstances, we must conclude that Lopez fails to meet the standard required of a pre-enforcement plaintiff to prove injury in fact, because he has not met the low threshold of clearly showing that he faces a specific, credible threat of adverse government action based on a violation of the sexual harassment policy.

Lopez, 630 F.3d at 792.

There is nothing in this language to suggest the alleged chilling effect on Petitioner Lopez's intended speech was objectively reasonable. The Question Presented is thus inapposite.

The first Question Presented also improperly refers to the District's sexual harassment policy as a "speech code." (*See* Petition for Writ of Certiorari at p.i.) This misnomer is repeated over and over throughout the Petition. "Speech code" is a term generally used to describe the broad disciplinary rules colleges enacted in the 1990's to restrict hate speech, but which drew conservative attack. (*See* Kenneth L. Marcus, "Higher Education, Harassment, and First Amendment Opportunism," 16 Wm. & Mary Bill Rts. J. 1025, 1030 (2008).) Petitioner basically admits that calling a policy a "speech code" means that it is constitutionally invalid. (*See* Petition for Writ of Certiorari at 11.) The Court of Appeals never determined this Policy to be one. The term thus does not belong in the Question Presented.

C. The Second Question Presented Ignores The Established Principle That A Party Cannot Use The Overbreadth Doctrine To Assert The Rights Of Others Unless The Party Has Standing Under Article III At The Outset

The second purported Question Presented asks whether a student "so affected" (i e., who experiences an "objectively reasonable chilling effect" as described in the first question) has "standing under the

overbreadth doctrine to assert the rights of others not before the Court." (Petition for Writ of Certiorari at p.i.) The Question is profoundly deficient and deceptive because it *assumes* that an "objectively reasonable chilling effect" can be established here, which plainly it cannot. It also is deficient in that it poses a question that has already been answered by this Court and many others.

Even in a First Amendment free speech case, if a party does not have standing under Article III, they cannot assert the rights of third parties. In the First Amendment case *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984), this Court made it clear that a party seeking to assert the rights of third parties can do so only if the party has shown, as a prerequisite, that the party itself has suffered an injury-in-fact sufficient to satisfy Article III's case or controversy requirement. "Under no circumstances . . . does the overbreadth doctrine relieve a plaintiff of its burden to show constitutional standing." *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006); *accord Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 554 (9th Cir. 2003) (a litigant must have standing in the form of "injury-in-fact" to make a First Amendment overbreadth challenge); *Midwest Media Property, L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456, 464 (6th Cir. 2007) ("Having suffered no cognizable injury, they lack standing to mount an attack on the township's sign regulations – whether under the overbreadth doctrine or under any other doctrine."). "[T]he overbreadth doctrine does not

relieve Plaintiffs from establishing Article III standing." *Houston Balloons & Promotions, LLC v. City of Houston*, 589 F. Supp. 2d 834, 846 (S.D. Tex. 2008).

The Question Presented also has an answer in common sense. If a litigant does not have sufficient injury-in-fact to have Article III standing, they cannot simply bypass the standing requirement by invoking the injury of a third party. This would eviscerate the standing requirement itself, and clearly cannot be the law. *See Lopez*, 630 F.3d at 792 ("Lopez properly recognized that he may only assert the rights of others "[s]o long as [he] satisfies the injury in fact requirement.").

IV. THE OPINION OF THE COURT OF APPEALS WELL SERVES THE PURPOSES OF ARTICLE III

The United States Supreme Court has described standing as "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit . . . ; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787. . . ." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-476, 102 Ct. 752, 70 L. Ed. 2d 700 (1982). "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

Indeed, this Court very recently, in *Arizona Christian School Tuition Organization v. Winn*, ___ S. Ct. ___, 2011 WL 1225707 (2011), applied Article III to limit the circumstances under which taxpayers could mount constitutional challenges in federal court. This Court articulated the importance of Article III in preserving principles of Separation of Powers. It explained: "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were 'extended to every question under the constitution,' Chief Justice Marshall once explained, federal courts might take possession of 'almost every subject proper for legislative discussion and decision.' 4 Papers of John Marshall 95 (C. Cullen ed. 1984)." *Id.* at *5.

The Ninth Circuit's decision here enforces these principles. It also confirms that, even in the free speech context, federal courts should not artificially dilute principles of Article III standing and thereby take further control over, and responsibility for, the decisions of public educators. Petitioner's proposed expansive approach to standing – allowing students to invoke federal judicial review simply by vouching in a highly conclusory manner that obscure or unenforced college policies chilled their speech – would improperly increase the role of the third branch of federal government in education. It would make federal courts the forum of *first resort* for any student challenge to any policy affecting speech that is

promulgated by a public educational institution (including high school, college, and university), regardless of the obscurity of the policy or whether there is any chance of enforcement. No other branch of federal government would have this increased level of involvement in public education.

Petitioner's proposed expansion of federal jurisdiction would also require federal courts to supersede the rights of states to administer the educational institutions they have created and funded, and would intrude into the domain of educators themselves. Indeed, as this Court recently described in a case concerning First Amendment association rights: "[W]e have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'" *Christian Legal Soc. Chapter of the University of California, Hastings v. Martinez,* 130 S. Ct. 2971, 2988, 177 L. Ed. 2d 838 (2010) (quoting *Board of Educ. v. Rowley,* 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). This Court concluded that the educator's "decisions about the character of its student-group program are due *decent respect.*" *Id.* at 2989 (emphasis added). This principle of "decent respect" further supports the ruling of the Court in this case.

V. CONCLUSION

The Court of Appeals in this case thoroughly and correctly applied existing principles of Article III

standing. It reached a result consistent with case law in this area. The cases which Petitioner contends present a circuit split do not in fact do so. Because there is no circuit split to resolve, this Court has no reason to hear this case, even to confirm the decision of the Court of Appeals is correct. For all of the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated: April 15, 2011

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No. 10-1136

IN THE

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JONATHAN LOPEZ,

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v.

KELLY G. CANDAELE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ARGUMENT

I. The Circuits Are Deeply Divided in Their Application of Article III Standing for First Amendment Facial Challenges.

A. In the Third Circuit, Students Have Standing to Facially Challenge Policies that Chill Their Speech.

The fog created by Respondents' arguments cannot obscure a basic reality: *McCauley v. University of the Virgin Islands,* 618 F.3d 232 (3d Cir. 2010), and the Ninth Circuit's decision in this case are incompatible. In the Third Circuit, students have Article III standing to facially challenge college policies that regulate their speech when those policies have the mere "potential" to chill speech. *Id.* at 238. In the Ninth Circuit, students have no standing to challenge such policies, even when the students demonstrate an objective chill on speech—caused by a policy that instructs them to not speak if they might "offend" someone—and uncontroverted evidence of actual and threatened enforcement. App. 8-13a, 110-12a, 114-15a, 121-24a, 126-27a. It is vital that this Court establish a uniform, national standard: a student whose speech is objectively chilled by the speech code of the university he or she attends has Article III standing to challenge it to vindicate the First Amendment.

Respondents overlook the square conflict between the Third and Ninth Circuits. Mr. McCauley had standing to challenge speech-restrictive policies based on allegations that those policies chilled his

ability to speak freely. *McCauley*, 618 F.3d at 237-38. But the Ninth Circuit rejected Jonathan Lopez's standing, despite uncontroverted evidence of an objective chill based on actual and threatened censorship under the speech code. App. 23-26a. Respondents admit McCauley had Article III standing to challenge "the policy," Resp't Br. at 4, but they incorrectly "assume[]," *id.* at 6, that the university's punishment of his speech under Paragraph E of the Student Code of Conduct, licensed him to challenge Paragraphs B, H, and R of the Code also. However, the Third Circuit analyzed McCauley's Article III standing to challenge each paragraph, and concluded he lacked standing to challenge Paragraph C, only because it did "not prohibit speech." 618 F.3d at 238-39.

By contrast, McCauley had standing to challenge paragraphs that regulated his speech, even when he experienced no actual or threatened enforcement, because those paragraphs had the *potential* to chill his speech. *Id.* at 238. Thus, the Third Circuit analyzed Article III standing for each paragraph of the Code and found McCauley merited standing for each paragraph that "chilled" his speech. *Id.* at 238-39.

Further, *McCauley* is buttressed by *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), and *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), which permitted students to facially challenge policies that chilled their speech.

In *DeJohn*, the student "felt inhibited" in talking about "women in combat and women in the military," because he "believed" these topics "were implicated by the [sexual harassment] policy," and could result in his punishment. *Id.* at 305.

In *Saxe*, the students felt "compelled by their religion" to speak about "homosexuality," but "feared" punishment under the school district's sexual harassment policy. 240 F.3d at 203. The district court found, and the Third Circuit upheld, that there was "no want of a proper party" because "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish." *Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621, 625 (M.D. Pa. 1999), *rev'd on other grounds*, 240 F.3d at 203-04.

Neither *DeJohn* nor *Saxe* involved actual or threatened punishment, aside from the threat of punishment latent in the policy. Yet, in both cases, the Third Circuit allowed the students to challenge facially the sexual harassment policies. The Ninth Circuit would have rejected the Article III standing of these plaintiffs. That is clear from the facts of this case: Lopez not only suffers a chill upon his speech due to Respondents' speech code, App. 116a, 126-28a; his professor censored him for allegedly creating an "offensive" environment under the speech code; his professor threatened him with the speech code on a later assignment; and his peers pleaded for his punishment for "offending" them, App. 9-12a, 111a, 114-15a, 118a, 121-22a, 126-27a. Respondents fail

to rebut this evidence. But despite this actual and threatened enforcement, which is more than adequate for standing in the Third Circuit, the Ninth Circuit rejected Lopez's standing to challenge the speech code.

The Ninth Circuit's decision in this case conflicts directly with *McCauley* and necessitates resolution by this Court.

B. In the Sixth and Seventh Circuits, Students Have Standing to Facially Challenge Policies that Chill Their Speech.

The Sixth and Seventh Circuits apply the correct standing rule as articulated by this Court: students have standing to facially challenge college policies that chill their speech. As a result, students in those jurisdictions challenged successfully speech-restrictive policies without any of the attendant evidence of actual and threatened enforcement that Lopez suffered in this case.

Although Respondents classify *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), as an overbreadth standing case, the Sixth Circuit affirmed the district court's conclusion that the students suffered a "direct injury" from the policy. *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 480 (E.D. Mich. 1993). This merited standing to challenge the policy, based on "an exception to the traditional rules of standing," which "allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain

statute is so broad as to 'chill'" speech. *Dambrot*, 55 F.3d at 1182.

The Sixth Circuit recognizes a sufficient injury-in-fact based on the speaker's allegations of chill and the expectation that the government enforces its laws. *See id.* at 1183 (rejecting the university's argument that the policy would not apply to the student-plaintiffs' speech). But the Ninth Circuit required Lopez to prove that Respondents interpret the speech code to apply to his speech—a fact that a savvy government defendant can simply deny. The Sixth Circuit forecloses such come-lately government renderings and focuses instead on the objective reasonableness of the speaker's chill based on the language of the policy.

Respondents point to *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008), as the Sixth Circuit's rejection of *Dambrot*. Upon closer inspection, however, *Morrison* was a vastly different case from *Dambrot* and this one. *Morrison* involved an as-applied claim for nominal damages based on a school district's harassment policy adopted during the litigation, *id.* at 607-08, not a facial challenge to a speech code that caused actual censorship, App. 9-12a, 70a. The policy in *Morrison* lacked an enforcement mechanism, 521 F.3d at 607, which caused the court to rely on this Court's limited decision in *Laird v. Tatum*, 408 U.S. 1, 10 (1972), a case involving a facial challenge to government activity that lacked any enforcement

mechanism.[1] Respondents have never denied the enforceability of their speech code, and the uncontroverted facts of Lopez's censorship confirm that viability. App. 117a, 119a.

Nothing in *Morrison* indicates that it superseded *Dambrot*. To the contrary, the cases have few similarities, and other Sixth Circuit decisions align with *Dambrot*. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) ("It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."). Unlike *Morrison*, the Ninth Circuit's decision here involves a non-moribund policy restricting student speech. App. 117a, 119a. Had Lopez attended a college in the Sixth Circuit and suffered the same censorship, he would have Article III standing to sue. In the Ninth Circuit, he does not.

Further, the Seventh Circuit's decision in *Zamecnik v. Indian Prairie School District #204*, -- F.3d --, 2011 WL 692059, *1 (7th Cir. Mar. 1, 2011), conferred standing to challenge an unlawful regulation of speech based on the student's fear of punishment. *Zamecnik* is consistent with Seventh Circuit (and Sixth Circuit) authority granting Article III standing to challenge laws that chill speech. *See, e.g.*, *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir.

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[1] Unlike the *Laird* plaintiffs, who challenged government activity they disagreed with, 408 U.S. at 9-10, Lopez challenges a policy that forces him to alter his speech, and under which he experienced actual and threatened punishment.

2003) (finding Article III standing to challenge political advertisement law on its face based on threat to speech "latent in the existence of the statute"). The Ninth Circuit's decision conflicts with the Sixth and Seventh Circuits' application of Article III standing to First Amendment facial challenges. The Petition should be granted to resolve this conflict.

C. Five Other Circuits Permit First Amendment Facial Challenges Based Upon Chilled Speech.

Respondents dismiss the First Amendment pre-enforcement holdings of the First, Second, Fifth, Eleventh, and District of Columbia Circuits on the grounds that the Ninth Circuit's decision does not prohibit pre-enforcement challenges, but merely that Lopez did not make such a challenge. Resp't Br. at 12-13. In doing so, however, Respondents ignore the conflict between the Ninth Circuit and these other circuits. The general rule among these circuits is that an injury-in-fact is established by an objective chill on speech caused by an enforceable government law, which is precisely what Lopez has experienced. *See, e.g., Act Now to Stop War & End Racism Coalition v. District of Columbia* ("*ANSWER*"), 589 F.3d 433, 435 (D.C. Cir. 2009) ("standing to challenge laws burdening expressive rights requires only a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law.") (citation and quotation marks omitted); *see also* Pet. at 30-33 (citing cases in each of the five circuits mentioned).

II. The Need to Resolve the Circuit Split and Protect the "Marketplace of Ideas" for Students Is of Exceptional Importance.

This case presents a circuit split that threatens to eviscerate student speech in the "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). Through this case, the Court can reaffirm a simple and straightforward standing rule: a student whose speech is objectively chilled by the speech code of the university he or she attends has standing to challenge it to vindicate the First Amendment. However, if left to stand, the Ninth Circuit's decision will give the government plausible deniability when sued by citizens for facially invalid laws, will allow campus speech codes to proliferate, and will elevate more marginally protected speech over student speech in the "marketplace of ideas."

A. The Decision Below Bars College Students from Exercising Their First Amendment Rights on Campus.

The Ninth Circuit's decision ignores the appropriate standing considerations in First Amendment cases and erects an insurmountable barrier to students who want to exercise their First Amendment rights on campus.

This Court has long held that an injury-in-fact is established when a "law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution."

Virginia v. Am. Booksellers, Inc., 484 U.S. 383, 393 (1988); *see Brockett v. Spokane Arcade*, 472 U.S. 491, 504 (1985) ("where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish, . . . [then t]here is then no want of a proper party to challenge the statute").

Rather than following this Article III standing precedent, the Ninth Circuit's decision all but eliminates the ability of students to challenge speech-restrictive policies on their face. To be sure, the decision below presents students with a Sisyphean task: establish Article III standing by proving that the *government's interpretation* of the policy applies to your speech, that you intend to violate the policy, and guarantee that the government will follow through with the threatened enforcement. App. 17a. Aside from departing from established precedent,[2] this task proves especially troublesome for challenges to overbroad and vague

---

[2] The Ninth Circuit's focus on the applicability of the policy "as interpreted by the government" conflicts with this Court's decisions that confer Article III standing based on the plaintiff's objectively reasonable interpretation of the statute. *Am. Booksellers*, 484 U.S. at 392; *see also United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

laws, which have no clear boundary or interpretation. While students can establish what they intend to say (as Lopez has done), once challenged in court, the government may attempt to disavow or interpret its policy in ways that render the policy inapplicable to the plaintiff's intended speech simply to avoid liability. Under the Ninth Circuit's standard, the thoughtful government attorney need only argue that her client does not interpret the policy that way or will no longer apply the policy to the plaintiff's speech—after he already experienced speech-chilling threats of punishment. The Ninth Circuit gives the government plausible deniability, able to overcome any assertion by the plaintiff that the overbroad and vague policy chills his speech. Article III standing cannot turn on the government's self-serving maneuvers to declare arbitrarily that it will not enforce a speech prohibition against a student when the plain wording of the prohibition indicates that it applies to the student.

The dangerous impact of the Ninth Circuit's standard is evident from this case. Despite Lopez's uncontradicted evidence of actual and threatened enforcement of the speech code by his professor and peers, and an objectively overbroad policy that instructs students, "[i]f unsure if certain comments or behavior are offensive, do not do it, do not say it," App. 123a, Respondents utilize the Ninth Circuit's standing barrier to disclaim the applicability of the speech code. They focus solely on Board Rule 15003(A) and label the other portions of the policy as only "aspirational." Resp't Br. at 13-18. But

Respondents speech code includes much more than just §15003(A), as the District Court recognized.[3]

In stark contrast to the Ninth Circuit, other circuits do not give the government plausible deniability when considering Article III standing. In cases of overbroad or vague regulations of speech, "there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention." *Dambrot*, 55 F.3d at 1183. Instead, there is a "conventional background expectation that the government will enforce the law." *ANSWER*, 589 F.3d at 435.

The Ninth Circuit's decision also disregards the widespread threats to student speech on college campuses today. As the Amicus Brief from the Foundation for Individual Rights in Education notes, despite decades of federal precedent invalidating overbroad and vague university speech codes, they persist across the country and present an objective threat to student speech. Amicus Br. at 4-9. Based on reports of censorship and punishment of students like Lopez, it is eminently reasonable for students to feel an objective chill on their speech, and it is simply unreasonable to allow the Ninth Circuit's decision to block students' access to the courts on that basis. Without intervention by this Court, speech codes will proliferate and chill student speech.

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[3] The District Court preliminarily enjoined and ordered stricken §15003(A) and the policy found on the websites. App. 89a.

B. The Ninth Circuit Inverts the Constitutional Protections for Speakers at the Highest Rungs of the First Amendment.

Respondents argue the decision below well serves Article III standing. Resp't Br. at 20-22. But the decision actually makes fully protected speech on campus an Article III loser, as forms of speech more susceptible to constitutional limitation are given standing to sue more freely.

Political action committees have greater access to the courts, even in the Ninth Circuit, when faced with laws that chill their speech. *See, e.g., Citizens United v. F.E.C.*, 130 S. Ct. 876, 888 (2010) (facial challenge to campaign finance law based on fear of prosecution); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1005 (9th Cir. 2003) (facial challenge to voter guide disclosure law based on fear of prosecution).

Even sexually oriented businesses benefit from a a more permissive Article III standing rule in First Amendment cases than that applied here. *See, e.g., Am. Booksellers*, 484 U.S. at 393 (facial challenge to law restricting sexually explicit material based on fear of punishment from plaintiffs' interpretation of law); *Brockett*, 472 U.S. at 494 (facial overbreadth challenge to obscenity law four days after effective date); *Legend Night Club v. Miller*, -- F.3d --, 2011 WL 541136, *1, 3 (4th Cir. Feb. 17, 2011) (facial challenge permitted despite little probability of enforcement and no evidence that plaintiffs were

subject to the law); *LSO Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000) (facial challenge to law that might threaten plaintiff's activities).

The practical result of the Ninth Circuit's decision is an insurmountable barrier to the federal courts for students whose speech is chilled by the policies of the university they attend. Under the Ninth Circuit's decision, those litigants, whose First Amendment rights are at their zenith in the "marketplace of ideas" and who experience objectively reasonable chills based on overbroad or vague university policies, receive less constitutional protection than litigants engaged in forms of speech that may be restricted more freely. This upside down result pays too much deference to college administrators, who may now hide unconstitutional speech codes behind the Ninth Circuit's insurmountable standing barrier. Left in place, the Ninth Circuit's decision leaves students with a Hobson's choice: speak and jeopardize a college education, or self-censor and abandon one's First Amendment rights. The Court should grant review to resolve this issue of exceptional national importance.

CONCLUSION

The Petition should be granted (along with the Petition in *Rock for Life v. Hrabowski*, No. 10-1137) to resolve the conflict among the circuits and establish a straightforward rule: a student whose speech is objectively chilled by the speech code of the university he or she attends has Article III standing to challenge it to vindicate the First Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a nonpartisan, nonprofit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE believes that the law must remain clearly and vigorously on the side of free speech on campus. For all of the reasons stated below, FIRE respectfully asks that this Court grant Jonathan Lopez's petition for writ of certiorari.

SUMMARY OF ARGUMENT

Certiorari is warranted in this case because the Ninth Circuit's decision will render students essentially unable to challenge unconstitutional speech codes without first risking punishment. In ruling that student Jonathan Lopez did not possess standing to challenge the Los Angeles Community College District's ("LACCD's") sexual harassment policy, properly found unconstitutional by the district court, the Ninth Circuit discounted Lopez's credible fear of punishment for engaging in protected speech and disregarded the purpose of relaxed standing requirements for First Amendment plaintiffs. While

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1. Counsel of record for the parties in this case have received timely notice of the intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The consents of the parties are being lodged herewith.

characterizing the case as "disturbing," the Ninth Circuit nevertheless ignored the fact that Lopez was warned that his speech might violate LACCD policy, and that other students reported him as having done so.

Lopez's treatment, and subsequent fear of future punishment, reflect the pervasive threat to free expression on campus today. Despite two decades of decisions striking down unconstitutional speech codes, FIRE's research demonstrates that a substantial majority of universities still maintain harassment policies that prohibit protected speech. Administrators often enforce these policies using precisely the type of "strained" reading that the Ninth Circuit believed was required to apply LACCD's harassment policy toward Lopez's speech. If allowed to stand, the Ninth Circuit's holding will improperly insulate these unconstitutional speech restrictions from facial challenge by erecting unreasonably high barriers to student suits.

This result will produce a chilling effect on campus, as students left without meaningful access to the courts will have little choice but to self-censor. This result is particularly harmful on a public college campus, a traditional locus for free expression that this Court has long identified as crucially important to our democracy. University students already face significant legal and practical obstacles to bringing suit; the Ninth Circuit's decision exacerbates the problem for students whose speech is chilled by unconstitutional speech codes.

Other circuits, following this Court's dictates, have permitted students to challenge university speech policies with a showing of credible fear of enforcement,

which Lopez has made. The Ninth Circuit's decision now conflicts with those of its fellow circuits, creating confusion regarding the appropriate showing that must be made before students (and potentially citizens at large) may bring First Amendment challenges. Because the Ninth Circuit's holding leaves students unable to fully exercise or defend their First Amendment rights, the Court should grant the petition for writ of certiorari and reverse the Ninth Circuit's decision.

ARGUMENT

I. CENSORSHIP ON CAMPUS IS A WIDESPREAD PROBLEM

As a government actor, the Los Angeles Community College District is subject to the limits of the First Amendment when regulating student speech. Yet LACCD maintains a sexual harassment policy that prohibits vast swaths of protected speech,[2] far beyond actionable student-on-student sexual harassment as identified by this Court.[3]

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2. Relevant sections of the LACCD policy are cited in the Ninth Circuit's opinion. *See* Order Amending Opinion and Amended Opinion in *Lopez v. Candaele*, No. 09-56238 (9th Cir. 2010), Appendix to Petition for Writ of Certiorari ("App.") at 6a–7a.

3. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (holding that applicable standard for student-on-student sexual harassment is "harassment of students that is so severe, pervasive, and objectively offensive and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities").

LACCD's unconstitutional policy, however, is only one instance of the larger problem of censorship on campuses nationwide. Despite decades of precedent overturning speech codes—university regulations prohibiting constitutionally protected expression—universities continue to employ speech codes restricting expression that does not rise to anywhere near the level of severity, pervasiveness, and objective offensiveness necessary to constitute peer harassment under *Davis*. *See* 526 U.S. at 633. While some students are punished under speech codes, countless more do not speak their minds for fear they may run afoul of overbroad policies like the one at issue.[4] If a student inarguably subject to such a policy lacks standing to challenge it until he or she can prove the administration intends to take punitive action, speech codes will continue to cast a pall over the marketplace of ideas on campus, where vigorous debate is essential.

A. Overbroad Speech Codes Persist on Campuses Across the Nation, Despite Decades of Precedent Striking Them Down

Each year, FIRE catalogs thousands of speech-related policies at universities nationwide. During the 2009–2010 academic year, FIRE reviewed policies at 286 of the country's largest and most prestigious public institutions in order to assess the state of free speech on campus. FIRE's research revealed that more than two-

4. In a recent study out of the University of Michigan, just 30.3% of college seniors "strongly agreed that it is safe to hold unpopular viewpoints on campus." *See* Eric L. Dey and Associates, *Engaging Diverse Viewpoints: What Is the Campus Climate for Perspective-Taking?* (Assoc. of Amer. Colleges & Universities 2010).

thirds of those institutions maintain policies explicitly prohibiting protected speech.[5] These policies violate the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[6]

For example, Northern Arizona University prohibits, as harassment, "stereotyping" and "negative comments or jokes" when they are "based upon a person's race, sex, color, national origin, religion, age, disability, veteran status, or sexual orientation."[7] In California State University–Monterey Bay's residence halls, "inappropriate comments or language . . . may be subject to conduct action."[8] At Central Washington University, "sexually harassing behavior" includes "sexist statements and

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5. Detailed information about FIRE's data and methodology may be found in our most recent annual report on speech codes, *Spotlight on Speech Codes 2011: The State of Free Speech on our Nation's Campuses*, available at http://www.thefire.org/code/speechcodereport.

6. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'")

7. Safe Working and Learning Environment Policy, http://home.nau.edu/images/userimages/lc94/6874/Safe%20policy%208.07.pdf (last visited Apr. 11, 2011).

8. CSU-Monterey Bay Student Housing & Residential Life Handbook, http://housing.csumb.org/sites/default/files/68/igx_migrate/files/17775-1L-CalStateMonterey%20-%20final%20draft.pdf (last visited Apr. 13, 2011).

behavior that convey insulting, degrading, or sexist attitudes."[9] Of course, merely "stereotyping," "negative," "inappropriate," "insulting," "degrading," or "sexist" statements—however disagreeable or offensive—are all protected by the First Amendment, meaning that these policies prohibit much protected speech on their face.

Unconstitutionally overbroad speech codes like these chill campus expression in the Ninth Circuit and nationwide.[10] Indeed, as this case demonstrates, such codes chill expression not merely in the dormitory and the student center, but also in the classroom—where nascent purveyors in the marketplace of ideas should be least fearful of government restriction. Yet, despite decades of precedent invalidating speech codes,[11] far too many universities have declined to revise their policies and restore student speech to its rightful position in the marketplace.

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9. Central Washington University Student Conduct Code, http://www.cwu.edu/~saem/index.php?page=student-conduct-code (last visited Apr. 11, 2011).

10. Additional examples of speech codes maintained by universities across the country are available at FIRE's Spotlight: The Campus Freedom Resource, http://www.thefire.org/spotlight.

11. *See, e.g.*, *McCauley v. Univ. of Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (declaring speech policies unconstitutional); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (declaring university sexual harassment policy overbroad); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional).

B. Lopez Reasonably Fears Punishment Under the College's Speech Code, Given Widespread Abuse of Similar Codes

In denying Lopez standing, the Ninth Circuit stated it would take a "strained construction of the sexual harassment policy" to "make it applicable to religious speech opposing homosexuality or gay marriage," and that there was no "showing that the sexual harassment policy even arguably applies or may apply to Lopez's past or intended future speech."[12] FIRE's experience demonstrates, however, that Lopez's fear that the university might punish his religiously-based views on sexual morality as "harassment" was entirely reasonable. Universities commonly construe their harassment policies broadly to punish controversial but protected speech that other students find unpopular, unpleasant, or offensive, regardless of its scholarly or political merit.

For example, at Tufts University, a student newspaper was charged with harassment for publishing an article consisting of quotes from the Koran and factual statements about Islam that were deemed unflattering.[13] A disciplinary committee found that the paper had "harassed" Muslim students and created a hostile environment by publishing the article because some felt "psychologically intimidated" by the piece.[14]

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12. App. at 28a.

13. *Islam-Arabic Translation: Submission*, The Primary Source, Apr. 11, 2007, at 23, *available at* http://www.thefire.org/public/pdfs/f102e5ae4168a0125d295748d41d0558.pdf?direct.

14. Outcome of the Committee on Student Life's Hearing of Complaints Brought by David Dennis and the Muslim Student

At Indiana University–Purdue University Indianapolis, a student-employee was investigated for reading the book *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan* during his work breaks. The university's Affirmative Action Office opined that the student had "used extremely poor judgment by insisting on openly reading the book related to a historically and racially abhorrent subject in the presence of [the student's] Black co-workers," who found the book "inflammatory and offensive."[15] Similarly, the University of Idaho instituted proceedings based on a complaint of "discrimination" in violation of the Student Code of Conduct due to a student's remark that "illegal immigration destroyed [his] home state of California" between songs at a campus celebration for César Chávez Day.[16, 17]

Troublingly, the language of the LACCD policy embraces similarly overbroad conceptions of "harassing" and "offensive" speech. On its face, the policy applies to all

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Association Against *The Primary Source*, Apr. 30, 2007, *available at* http://www.thefire.org/public/pdfs/5e4f4b4bdadd652d41a425c952c43e49.pdf?direct.

15. Letter from Lillian Charleston, Affirmative Action Officer, to Keith Sampson (Nov. 25, 2007), *available at* http://www.thefire.org/public/pdfs/4b26b68ef98eb6b6de987138657f0467.pdf?direct.

16. Complaint Before the University Judicial Council, *Univ. of Id. v. Alexander R. Rawson* (Apr. 5, 2010), *available at* http://www.thefire.org/public/pdfs/102dc04933308881d8a124f5901fac0e.pdf?direct.

17. Additional examples of the overbroad construction of school harassment policies are available in FIRE's case archive, http://www.thefire.org/cases/all.

students and prohibits "conduct [that] has the purpose *or effect* of . . . creating an intimidating, hostile or offensive work or educational environment."[18] By characterizing harassment in terms of its effect—without reference to objective criteria—the policy invites censorship on the basis of other students' subjective reactions to the challenged speech. Moreover, the policy makes no exception for serious, sincere political commentary, scholarly criticism, religious expression, or other speech at the core of First Amendment protection. A student may reasonably conclude, therefore, that the policy would apply to any speech a faculty member or other student might subjectively find "intimidating, hostile, or offensive," no matter how unreasonably.[19]

Accordingly, LACCD's policy, like numerous others across the nation, may be invoked against a sizeable unchartered territory of protected speech. Depriving students of a legal avenue to challenge unconstitutional speech codes virtually ensures that such codes will persist at our nation's universities.

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18. App. at 7a (emphasis added).

19. *Id. See also* App. at 9a (quoting Office of Diversity Programs website that warns, "If [you are] unsure if certain comments are offensive, do not do it, do not say it."); *id.* (quoting Compliance Office website defining harassment as "generalized sexist statements, actions or behavior that convey insulting, intrusive, or degrading attitudes/comments about women or men").

II. THE NINTH CIRCUIT'S DECISION ERECTS AN IMPOSSIBLY HIGH BARRIER THAT EXACERBATES THE DIFFICULTIES ALREADY FACED BY STUDENTS CHALLENGING UNCONSTITUTIONAL UNIVERSITY POLICIES

The Ninth Circuit's decision acknowledges that First Amendment cases raise "unique standing considerations," *see* App. at 5a (quoting *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)), that necessitate "relaxed standing requirements." App. at 35a. The Ninth Circuit also appears to appreciate that "[f]ormal *and informal* enforcement of policies that regulate speech on college campuses raises issues of profound concern." App. at 34a (emphasis added). Yet the Ninth Circuit deemed insufficient Lopez's credible fear that LACCD would enforce its harassment policy against him even after he was reprimanded by a professor who cited the policy. *See* App. at 11a. The Ninth Circuit further overlooked Lopez's claim that he wished to discuss his religion in the future in a way that had already resulted in the same professor silencing his speech on grounds that it was "offensive" (using the vague and subjective language of the harassment policy), and had prompted two students to write letters to the administration seeking punishment for Lopez's "offensive" remarks.[20] *Id. See also* App. at 29a ("Lopez fails to allege, let alone offer concrete details . . . regarding his intent to engage in conduct expressly forbidden by the sexual harassment policy.").

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20. *See* Verified Complaint for Injunctive and Declaratory Relief, Monetary Damages, and Attorneys' Fees and Costs, App. at 126a (Lopez's claim that he "finds himself consistently engaged in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101," in which he explored his religious beliefs).

Notwithstanding the fact that the harassment policy *was* expressly invoked against Lopez by his professor, the Ninth Circuit required too much. *Cf. Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a *direct prohibition* against the exercise of *First Amendment* rights.") (first emphasis added). The precise point of a vagueness and overbreadth challenge is that the language of the policy is unclear as to what types of speech come within its reach; because of the ambiguity, speech that is protected by the First Amendment is chilled. Lopez had a credible fear that LACCD's vague and overbroad harassment policy would be enforced against him—a result threatened by his professor and requested by his peers.

A. The Ninth Circuit's Standing Analysis Contravenes the Rationale Behind the Relaxed Standing Rules for First Amendment Plaintiffs

As the Ninth Circuit itself has noted, "[I]n recognition that 'the First Amendment needs breathing space,' the Supreme Court has relaxed the prudential requirements of standing in the First Amendment context." *Canatella v. California*, 304 F.3d 843, 853 (9th Cir. 2002) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Plaintiffs challenging a law regulating speech on overbreadth grounds need not show that their own rights to free expression have been violated. *Broadrick*, 413 U.S. at 612. Overbreadth challenges safeguard the rights of those not before the court "who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane*

Arcades, Inc., 472 U.S. 491, 503 (1985). Accordingly, in a First Amendment overbreadth case, "standing arises 'not because [the plaintiff's] own rights of free expression are violated, but because of a judicial prediction or assumption that the [challenged statute's] very existence may cause others not before the court to refrain from constitutionally protected speech." *Canatella*, 304 F.3d at 853.

The overbreadth doctrine thus reflects the courts' concern that unconstitutional regulations will have a "chilling effect" on speech. *Bayless*, 320 F.3d at 1006. If plaintiffs were required to risk punishment to test the constitutionality of a statute, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1985). Plaintiffs are therefore permitted to bring pre-enforcement actions, under a "'hold your tongue and challenge now' approach." *Bayless*, 320 F.3d at 1006. Because free expression redounds to the benefit of all citizens, a plaintiff who does challenge a law on First Amendment grounds must show only that "he and others in his position face a credible threat of discipline under the challenged statutes, and may consequently forego their expressive rights under the First Amendment." *Canatella*, 304 F.3d at 854.

The Ninth Circuit articulated three related inquiries to determine whether pre-enforcement plaintiffs face a credible threat of adverse state action: (i) whether there is a reasonable likelihood that the government will enforce the challenged law against the plaintiffs; (ii) whether the plaintiffs establish that they intend to violate the challenged law; and (iii) whether the challenged law is applicable to the plaintiffs, either by its terms or as

interpreted by the government. App. at 17a. In spelling out each of these factors, however, the Ninth Circuit cited largely non-analogous cases to arrive at a standard much more stringent than the relaxed standard required for First Amendment overbreadth claims, essentially demanding Lopez to make a clear showing that the harassment policy was enforced against him or someone in a situation dramatically similar to his.

In defining how much plaintiffs must show to satisfy the first requirement—a reasonable likelihood that the law will be enforced against them—the Ninth Circuit largely relied on cases not involving overbreadth challenges,[21] and thus applied this factor too strictly to Lopez's claim.[22] In *Rincon*, for example, a Native American group brought an action for declaratory and injunctive relief against enforcement on its reservation of a county gambling ordinance on the ground that the ordinance was an

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21. *See e.g.*, *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1 (9th Cir. 1974); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947).

22. Even the cases cited that did involve overbreadth claims involved unique circumstances, not present here, which weighed against a finding of standing. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 42 (1971) (involving the "serious matter" of a federal suit to enjoin a pending state prosecution); *Mitchell*, 330 U.S. at 89, 90 (holding that suit by federal employees to enjoin enforcement of statute proscribing involvement in political campaigns was "really an attack on the political expediency of the [statute], not the presentation of legal issues"); *Laird*, 408 U.S. at 11 (distinguishing challenge to mere existence of Army's data-gathering system from typical overbreadth challenges to "regulatory, proscriptive, or compulsory" statutes).

encumbrance on or regulation of trust property. 495 F.2d at 2, 3. Not only was there no claim that the ordinance was overbroad, *Rincon* was not even a First Amendment case. *See id.* at 6 (noting that plaintiffs did not "allege actual interference with fundamental rights" and attempting to distinguish a case cited by the dissent on the grounds that "[p]erhaps [the dissent's case] is a special case involving First Amendment issues that makes it sui generis"). It is precisely this action's nature as a First Amendment overbreadth challenge that sets it apart from many of the cases cited by the Ninth Circuit.

The Ninth Circuit relied largely on *Thomas* (again, not an overbreadth case) to define the second requirement that plaintiffs establish with some degree of concrete detail that they intend to violate the challenged law. In so doing, the Ninth Circuit required Lopez to "'articulate[ ] a "concrete plan" to violate the law in question' by giving details about [his] future speech such as 'when, to whom, where, or under what circumstances.'" App. at 20a (quoting *Thomas*, 220 F.3d at 1139). But this standard overstates the level of specificity required for First Amendment claims based on vagueness and overbreadth. *See Getman v. Cal. Pro-Life Council, Inc.*, 328 F.3d 1088, 1094 (9th Cir. 2003) ("Our ruling in *Thomas* did not purport to overrule years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights . . . . Particularly in the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements."), *appealed on remand*, *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007), *abrogated on other grounds by Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

With respect to the third factor, the Ninth Circuit indicated that plaintiffs' claims of future harm lack credibility where: (i) the challenged speech restriction by its terms is not applicable to the plaintiffs; or (ii) the government has affirmatively disavowed an intent to enforce the challenged statute. App. at 21a. The cases cited by the Ninth Circuit involved challenged speech restrictions that specifically applied to groups to which the plaintiff did not belong.[23] Moreover, in some of the cases, state authorities affirmatively disavowed "any interpretation of [the statute] that would make it applicable in any way to [plaintiffs]." *Stuart*, 702 F.2d at 195.

This case concerns neither a speech restriction which by its terms is not applicable to the plaintiff, nor a statute that the government has affirmatively disavowed an intent to enforce. The LACCD harassment policy by its terms applies to "students" like Lopez. App. at 6a. Moreover, the College has never disavowed any intent to enforce the harassment policy. Rather, the policy is prominently displayed in two Board Rules, the LACC Student Handbook, and four webpages. *Id.* at 6a–9a.

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23. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994) (holding that collective bargaining agreement "by its plain language applie[d] only to the Union and not to its individual members"); *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983) (holding that Oregon teachers had no standing to challenge textbook selection statute because language of statute applied "only to those empowered to select textbooks for the schools," which did not include "teachers"; and distinguishing cases "aimed directly at those asserting standing to challenge them").

As stated in his complaint (*see* App. at 126a–127a), Lopez reasonably believes that his speech is covered by the sexual harassment policy.[24] Given the strong reaction his speech has already provoked, he has a credible fear that expressing his religious views on "issues of marriage, gender, and sex," *see* Petition for Writ of Certiorari ("Pet'n") at 10, may violate the policy's prohibition against "actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men," *see* App. at 123a, and he has refrained from speaking as a result.

The Ninth Circuit discounted the instances in which LACCD's policy was invoked against Lopez and may be invoked against him in the future. *See* Pet'n at 2, 5–6, 15. In so doing, the Ninth Circuit essentially required a showing that the policy was enforced against Lopez or someone in a dramatically similar situation. Thus, the Ninth Circuit's ruling directly contradicts the purpose of the relaxed standing requirement.

B. The Ninth Circuit's Heightened Standing Requirement Conflicts with Other Circuits' Decisions in Similar Cases

As detailed in Lopez's petition, Pet'n at 16–26, the Ninth Circuit's decision conflicts dramatically with similar cases

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24. "The combination of Defendant Matteson's censorship and hostility toward Mr. Lopez's Christian viewpoints, Defendant Moore's and Jones' accusations that Lopez's speech 'offended' others, and the District's sexual harassment policies that prohibit students from saying anything 'offensive,' has chilled Mr. Lopez's expression at the College and caused him to refrain from discussing his beliefs with respect to political, social, and cultural issues and events." App. at 127a.

from both the Third and Sixth Circuit Courts of Appeal.[25] In *McCauley v. University of the Virgin Islands*, 618 F.3d at 238, the Third Circuit ruled that a student had standing to challenge several provisions of a university's speech policy even though the student did not allege that he suffered any deprivation under these provisions. The decision rested on the "judicial prediction or assumption" that restrictions prohibiting "lewd or indecent conduct" and "offensive" signs at sporting events and concerts "may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* The Third Circuit required no showing from the plaintiff that he intended to violate the university's speech policy. This decision properly applies First Amendment standing doctrine, in stark contrast to the Ninth Circuit's heightened standing requirement.

The Ninth Circuit's amended opinion attempts to distinguish *McCauley* by asserting that the plaintiff student had standing to assert the First Amendment rights of others bound by the challenged provisions only because he had suffered an injury-in-fact when he was disciplined for violating another provision in the speech code. App. at 32a. But nowhere in the *McCauley* opinion did the Third Circuit condition the plaintiff's standing to bring a facial challenge against portions of the policy on the fact that he was disciplined under another provision. Rather, the Third Circuit held that the plaintiff had standing to mount a facial challenge—even though "he conceded that he had suffered no deprivations" from the challenged provisions—because "his speech and the

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25. The decision also conflicts with the recently decided *Zamenick v. Indian Prairie Sch. Dist. #204*, Nos. 10-2485, 10-3635, --- F.3d ----, 2011 WL 692059 (7th Cir. Mar. 1, 2011).

speech of other students was chilled by the Code," and because those provisions "all ha[d] the potential to chill protected speech." 618 F.3d at 238. Since courts should "freely grant[] standing to raise overbreadth claims," the chilling effect of the challenged provisions on the plaintiff's and other students' speech was a sufficient basis for standing. *Id.*

The Ninth Circuit's assessment of what constitutes a credible threat of enforcement also conflicts with the Sixth Circuit's decision in *Dambrot v. Central Michigan University*, 55 F.3d at 1183 n.5 (overturning university harassment policy prohibiting speech "that stigmatizes or victimizes an individual" on the basis of immutable characteristics like race, age, and sex). The Sixth Circuit found a "realistic danger" that the university would enforce its policy where the "text of the policy" clearly showed that "language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." *Id.* at 1183.[26] This holding, if applied in the Ninth Circuit, would provide standing for Lopez.

National uniformity is of special importance in cases concerning federal constitutional rights. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (noting "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution");

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26. The Sixth Circuit also recognized that neither a court nor a student ought to accept a school's representation that an overbroad speech code will not be interpreted to restrict First Amendment rights. *See Dambrot*, 55 F.3d at 1183.

United States v. Laville, 480 F.3d 187, 193 (3d Cir. 2007) ("[A] patchwork of federal constitutional standards . . . is inconsistent with our single federal constitution."). It is, therefore, necessary for this Court to intervene and resolve the confusion over whether college students have standing to challenge their schools' speech codes under the First Amendment.

C. University Students Already Face High Barriers to Bringing First Amendment Challenges

The Ninth Circuit's decision compounds the obstacles already faced by students challenging their universities' unconstitutional speech restrictions, making it even more likely that speech codes will remain official university policy, improperly insulated from constitutional challenge.

First, the doctrine of mootness presents special problems for university students. College students' cases become moot once they are no longer students or subject to university policies. *Doe v. Madison Sch. Dist.*, 177 F.3d 789, 798 (9th Cir. 1999) ("A student's graduation moots claims for declaratory and injunctive relief . . . ."); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (holding that law student's challenge to school policy was moot where student was in final semester and would "receive his diploma regardless of any decision this Court might reach on the merits of this case"). As a result, there is a small window of time in which an individual student may file a civil rights lawsuit against his or her university, especially given the protracted nature of litigation.

In addition, students charged with violating university policy often wish for the charges to remain confidential to protect their reputations. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 220–21 (3d Cir. 2001) (describing school district policy that informal resolution of harassment complaints "may remain confidential and no further action is necessary"); *see also* LACCD Prohibited Discrimination and Harassment Policy, at § 15005, *available at* http://www.laccd.edu/board_rules/documents/ChapterXV.doc (providing for the confidentiality of all complaints under the harassment policy). Students actually injured by unconstitutional policies, therefore, are less likely to bring suit and jeopardize the confidentiality surrounding university proceedings.

Finally, universities may use the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, as a shield when refusing to release information about how their policies affect students. FERPA withholds federal funds from educational institutions which have a "policy or practice" of releasing student records without consent. *See id.* As a consequence of this student-protective law, however, information about university disciplinary proceedings, and the enforcement of university policies, is further insulated from public scrutiny. *See, e.g.*, Jamie Ball, *This Will Go Down on Your Permanent Record (But We'll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 Sw. U. L. Rev. 477, 485 (2004) (noting that FERPA has raised "significant questions where [the] right to privacy conflicts with countervailing interests in access to information").

D. Allowing *Lopez* To Stand All But Guarantees That Speech Codes Will Remain on Campuses Indefinitely

If this Court allows the ruling in *Lopez* to stand, university students will be barred from challenging unconstitutional speech policies in all but the rarest of cases. The decision would require students facing the chilling effect engendered by the existence of such policies to wait until an official within their institution indicates that a particular policy will be applied against them. On the contrary, pre-enforcement plaintiffs challenging provisions on First Amendment grounds should not have to "show that the authorities have threatened to prosecute [them]; the threat is latent in the existence of the statute . . . . [I]f it arguably covers [the plaintiffs' intended speech], . . . there is standing." *Getman*, 328 F.3d at 1095 n.10. As a result of the Ninth Circuit's failure to apply the relaxed standard of First Amendment overbreadth cases, many unconstitutional speech codes will remain in force, misinforming students of their expressive rights and stifling student dialogue.

III. RELAXED STANDING REQUIREMENTS ARE OF PARTICULAR IMPORTANCE FOR COLLEGE STUDENTS

A. The College Campus Is a Special Concern of the First Amendment

This Court's review is necessary because the Ninth Circuit's decision, which will affect all First Amendment plaintiffs, will be especially harmful on the university campus. By impermissibly chilling speech, speech codes

will continue to limit dialogue in the place where it is meant to be freest—the college campus. Indeed, Lopez's case offers an unusually stark example of the chilling effect on academic development and scholarly debate, as it arose within the four walls of a Speech 101 classroom.

Decades of precedent have made clear that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). As this Court has stated, "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

Courts have long recognized that students and faculty must be allowed to discuss and debate their views openly and honestly. This Court has rejected the paternalistic notion that "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180. "Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* Indeed, as the Fourth Circuit Court of Appeals recently reaffirmed, the First Amendment protects even inconvenient or uncomfortable faculty speech made for scholarly and pedagogical purposes.[27] If employees of a university deserve unfettered First

27. *See Adams v. Trustees of Univ. of N.C.-Wilmington*, No. 10-1413, --- F.3d ----, 2011 WL 1289054, at *12 (4th Cir. Apr. 6, 2011).

Amendment protection for their academic work, students deserve no less.[28] Yet the standing doctrine adopted by the Ninth Circuit effectively requires students to disrupt order unnecessarily, pick a constitutional fight with their superiors, and risk attendant academic and reputational consequences in order to vindicate their rights.

B. Speech Codes Misinform Students About Freedom of Expression

Likewise, the existence of speech codes at colleges and universities is especially harmful because it misinforms students about the nature and operation of the First Amendment itself. Critically, the First Amendment confers an individual right to speak freely—enforceable against the government—not an individual right to avoid being offended, enforceable against other speakers. Speech codes undermine not only the freedom to speak but also its attendant responsibilities by fortifying some students' unreasonably "thin skin" with a shell of government protection. By continuing to maintain these illiberal policies, universities are failing to prepare students for life in a free, democratic society, instead teaching them to censor.

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28. Moreover, the Ninth Circuit failed to recognize that Lopez's intended speech—sincere commentary of a religious nature—implicates even more profoundly the First Amendment values at stake in this case. Accordingly, the Ninth Circuit's restrictive standing doctrine endangers not merely "vigorous, argumentative, unmeasured, and even distinctly unpleasant" speech, *see Rodriguez v. Maricopa County Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2010); it also silences the expression of sincerely-held religious beliefs, speech at the core of First Amendment protection. *See Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

Recently, the Ninth Circuit observed that "[t]he Constitution embraces . . . a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high," and noted that "[t]his is particularly so on college campuses." *Rodriguez*, 605 F.3d at 708. In *Rodriguez*, the Ninth Circuit demonstrated its understanding of the significance of robust dialogue in the academic setting, recognizing that educating students about life in a liberal, democratic society is of utmost importance to the continued health and vitality of our nation. With its ruling below, however, the Ninth Circuit has contradicted and endangered this long-recognized understanding of the university's role. This Court must act to correct its error.

CONCLUSION

Standing should not pose a barrier to judicial review of a campus policy that undoubtedly applies to a student and may reasonably be interpreted to restrict the student's intended speech. The Ninth Circuit's decision in *Lopez* contradicts the law of other circuits and creates an unjust barrier to students' ability to challenge such policies. For the foregoing reasons, FIRE respectfully asks that this Court grant Jonathan Lopez's petition for writ of certiorari.

Respectfully submitted,

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